SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 143.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ELIAS E. BARNES.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims.

ELIAS E. BARNES
vs.
THE DISTRICT OF COLUMBIA. } No. 47. D. C.

I.—*Original petition. Filed August 4, 1880.*

To the honorable the judges of the Court of Claims:

The petition of Elias E. Barnes respectfully represents:

1. That he is a citizen of the United States and a resident of the District of Columbia.

2. That subsequent to February 21, 1871, and prior to December 1, 1875, under contracts with the board of public works and with the Commissioners of said District of Columbia, he had done and performed a large amount of work in the improvement of North Carolina avenue between New Jersey avenue and Fourth street southeast, as appears by the measurements on file in said District, together with extra work done under orders of the District authorities, and that upon a just settlement of his said accounts and for materials furnished, there was due him on said February 1, 1876, a balance of thirty-six thousand nine hundred and eighty-seven and $\frac{11}{100}$ dollars.

3. That upon a just settlement of his accounts for the improvement of D street southeast between New Jersey avenue and Sixth street, there was due him on said December 1, 1875, a balance of fifteen hundred and twenty-four $\frac{63}{100}$ dollars, for work done and materials furnished under contracts with said board of public works and the Commissioners of said District.

4. That there was also due him at said date for work done and materials furnished in the improvement of Third street southeast from D street to the river, under contracts as aforesaid, the further sum of eight thousand two hundred and twelve $\frac{36}{100}$ dollars as the balance of his account on said street.

5. That upon settlement of his account for the improvement of E street southeast between First and Sixth streets, under contracts as aforesaid, there was at said date due him the further sum of one hundred and $\frac{69}{100}$ dollars.

6. That upon settlement of his accounts for the improvement of C street southeast between South Capitol and Third streets, under contracts as aforesaid, there was due him at said date a balance of twenty-two hundred and eighty and $\frac{2}{100}$ dollars.

7. That upon settlement of his accounts for the improvement of M street south between Fourth street east and Four-and-a-half street west, under contracts as aforesaid, there was due him at said date the further sum of eleven thousand six hundred nine and $\frac{14}{100}$ dollars.

8. That for taking up and removing brick pavements, curb, gutters, and other old material under orders from the said board of public works prior to August 1st, 1874, there is justly due him the sum of five thousand four hundred twenty-six and $\frac{74}{100}$ dollars.

2 9. That upon settlement of his account for work done on Second street southeast, made in January, 1876, there was retained a per-

centage of one hundred seventy-one and $\frac{69}{100}$ dollars, which is still due and unpaid.

10. That upon settlement of his accounts for putting down a pipe and brick sewer on I street southeast between Second and Third streets, there was withheld from him a percentage amountin*t* to forty-nine and $\frac{29}{100}$ dollars, for work done prior to January 1, 1875, as per board of audit voucher No. 14129.

And petitioner avers that said several sums, amounting in the whole to sixty-six thousand three hundred sixty-one and $\frac{67}{100}$ dollars, are still due and unpaid, and he prays judgment therefor against the said District of Columbia.

E. E. BARNES.

Elias E. Barnes, the petitioner aforesaid, says that the facts stated in the foregoing petition are true; that he is justly entitled to the amount therein claimed after allowing all just credits and offsets; that no assignment or transfer of said claim *as* any part thereof or interest therein has been made other than two powers of attorney to one S. J. Ritchie to collect two small sums, one of six thousand dollars and one of five thousand dollars, both of which said power- of attorney have been revoked by written instrument, duly executed and filed with notice; and one unrevoked power of attorney to said Ritchie to collect one thousand dollars on account.

Sworn to and subscribed this 3d day of August, A. D. 1880, before me,

CHARLES WALTER,
United States Com'r.

Claimant's address, Washington, D. C.

SAM M. WILCOX,
Att'y for Claimant, Washington, D. C.

II.—*General traverse. Filed December 10, 1880.*

And now comes the Attorney-General, on behalf of the District of Columbia, and answering the petition of the claiman*d* herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Assistant Attorney-General.

III.—*Samuel J. Ritchie, intervenor.*

On the 20th day of November, 1880, Samuel J. Ritchie, by leave of court, filed his petition intervening.

3 IV.—*Plea of set off. Filed January 26, 1882.*

ELIAS E. BARNES
vs.
THE DISTRICT OF COLUMBIA. } No. 47.

And now comes the Attorney-General on behalf of the District of Columbia, and for a further plea says:

That at and before the institution of this suit, the claimant was and still is indebted unto the District of Columbia in the full and just sum of $25,000 for money had and received to the use of the defendant, and the said claimant being so indebted as aforesaid, in consideration thereof promised to pay the defendants the said sum of money on request; yet the said claimant, although often requested so to do, hath not, nor hath anyone in his behalf, as yet paid the same sum or any part thereof, but hath wholly neglected and refused, and still neglects and refuses, so to do; which said sum so due as aforesaid the defendant claims to set off against the demand of the claimant, and thereupon he brings his counter claim.

THOMAS SIMONS,
Assistant Attorney-General.

V.—*Replication. Filed February 10, 1882.*

Now comes the claimant by H. E. Paine, his attorney, and for replication to the plea of set off herein filed on the 26th day of January, 1882, says that by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said defendant, because he says that he is not indebted to the said defendant in the sum of $25,000, as in said plea alleged, or in any other sum, and that he has not, at any time, promised to pay said sum or any part thereof to said defendant; wherefore he prays judgment for the sum of $66,174.36 as demanded in his petition herein filed.

ELIAS E. BARNES,
By H. E. PAINE, *Atty.*

DISTRICT OF COLUMBIA, *ss:*

Elias E. Barnes, having been duly sworn, says that he is the claimant named in the foregoing replication, and that said replication is true.

ELIAS E. BARNES.

Subscribed and sworn to before me, this 10th day of February, 1882.

RUTLEDGE WILLSON,
Notary Public.

4 VI.—*Amended petition. Filed March 31, 1883.*

AMENDED PETITION.

To the Honorable Court of Claims:

Elias E. Barnes respectfully prefers his petition, to wit:

I.

That he is a citizen of the United States and a resident of the District of Columbia.

II.

That April 29, 1872, claimant entered into a contract with board of public works, known as contract No. 264, for the improvement of North Carolina avenue, between New Jersey avenue and Fourth street, and of

D street, Southeast; also for the construction of certain sewers. That said contract was subsequently extended by the board of public works, and by the Commissioners of the District of Columbia, to provide for a large amount of additional work on the same, and on other streets.

III.

That prior to the commencement of the claimant's work, under said contract, there had been excavated from the line of North Carolina avenue, within the limits of said contract, 33,377⅔ cubic yards of earth and sand.

That under said contract and extensions, and under orders from defendant's officers in connection therewith, claimant did work and furnished materials, as follows:

5 *On North Carolina avenue.*

2,318 lineal feet 12-inch new gutter flagging laid, at 35 cents per foot		$811.30
629 feet 16-inch gutter flagging laid, at 48 cents per foot		301.92
17.7 feet 5-inch granite circular curb and setting, at $2.05 per foot		36.28
14.1 feet 5-inch circular curb, Gleason pattern		28.90
64 cubic yards sewer excavation, at 40 cents per yard		25.60
90 feet 12-inch pipe laid, at 77 cents		79.20
1 trap or receiving basin		157.58
3,972.34 square yards gravelling, at 15 cents		595.85
3,008.92 square yards new brick pavement, at $1.00 per yard		3,008.92
1,376 square yards cobblestone laid, at 70 cents per yard		963.20
1,210.7 feet 16-inch flagging for crossing laid, at 60 cents		926.42
1,889.3 feet 5-inch new curb and setting, at $1.20 per foot		2,267.16
750 feet of blind drain, at $1.00 per foot		750.00
44,975 cubic yards grading (under board of public works), at 30 cents		13,492.50
44,975 cubic yards hauled 868 feet over 200 feet, at 1¼ cents per yard per 100 feet		4,879.78
44,136.6 cubic yards grading (under Commissioners of the District of Columbia), at 30 cts		13,240.08
44,133.6 cubic yards hauled 1,550 feet over 200 feet, at 1½ cents per yard per 100 feet		6,549.06
23,704 cubic yards clay excavation, at 30 cents additional		7,111.20
		$55,224.95
Credit by certificates	$43,226.36	
" " materials	89.50	
		43,315.86
Balance due March 1, 1876		11,909.09

IV.

That under the extension of said contract, or under orders of defendant's officers in connection therewith, claimant also did work and furnished materials as follows:

On C street from So. Capt. to 3d street East.

2,847.40 square yards new brick pavement laid, at $1.00 per square yard.		$2,847.40
8.33 square yards old brick pavement relaid, at 25 cents per square yard.		2.08
865.67 sq. yds. new cobblestone pavement laid, at 70 cents per square yard		605.98
2,141 lin. ft. 5-in. new B. S. curb and setting, at $1.20 pr. ft		2,569.20
6 34.5 lin. ft. 5 in. curb reset, at 25 cents		8.62
10.5 " " 6 " " " " 30 "		3.15
21.35 " " 6 " granite cir. curb and setting, at 20 cts. pr. ft		43.47

6.25 lin. ft. 6 in. granite cir. curb reset, at 30 cts. pr. ft		$1.87
2,191 running feet 12-inch new gutter flagging laid, at 35 cents per foot		766.85
207 running feet 16-inch new gutter flagging laid, at 48 cents		99.36
2,848.6 cub. yds. grading, at 40 cts. per yd		1,139.44
4,469.6 " " " " 30 cents pr. yd		1,340.88
7,318.2 " " " haul 1,220 feet over 200 feet, at 15.25 cts. pr. yd.		1,116.02
3,060 sq. ft. gravelling, at 15 cts. pr. yd		459.00
1,326 ft. B. S. curb redressed, at 20 cts. pr. ft.		265.20
Sewer work 2d to 3d sts. (net)		328.99
1,801 cub. yds. grading, at 30 cents		540.30
1,801 cub. yds. hauled 1,220 feet over 200 feet, at 15¼ cents per yard		274.65
		$12,412.76
Credit by certificates	$8,177.79	
" " materials	1,140.00	
		9,317.79
Balance due November 1, 1875		$3,094.97

V.

That under said contract extensions, or under orders of defendant's officers in connection therewith, claimant also did work and furnished materials, as follows:

On D street SE.

438 sq. yds. old brick pavement laid, at 25 cts. per yd		$109.50
3,060 cub. yds. grading, at 40 cts. per yard		1,224.00
16,250 " " " " 30 " " "		4,877.40
17,518 " " haul, 2,400 ft. over 200 ft., at 30 cts. pr. yd		5,255.40
1,345 sq. yds. of sodding, at 50 cts. pr. sq. yd		672.50
2,159 cub. yds. grading, at 40 " " " "		863.60
3,841 " " " " 30 " " " "		1,152.30
6,000 " " haul, 3,014 ft. over 200 ft., at 37.68 cents per yard		2,260.80
4,667.11 sq. yds. new brick pavement laid, at $1.00		4,667.11
4,266.45 lin'l ft. 5 in. new B. S. curb and setting, at $1.20 per foot		5,119.74
435 lin'l ft. 6 in. new granite curb and setting, at $1.42 per foot		617.70
41.4 lin'l ft. granite circ. curb and setting at $2.05 per foot		84.87
932.4 sq. yds. new cobblestone pavement laid, at 70 cts. per yard		652.68
3,735.6 sq. yds. gravelling, at 15 cents		560.34
7 solid granite corners, at $25 each		175.00
Amount retained per voucher No. 14,902		154.80
7 2,57[illegible] ft. 12 in. gutter flagging laid, at 35 cents		$900.20
574 ft. 16 in. bridging laid, at 60 cents		344.40
465 cub. yds. grading, at 30 cents		139.50
465 cub. yds. extra haul, at 37.68 cts.		174.21
		$30,006.05
Credit by certificates	$26,412.67	
" " material	577.88	
		26,990.55
Balance due March 1, 1876		3,015.50

VI.

That under the extensions of said contract, or under orders of defendant's officers in connection therewith, claimant also did work and furnished materials, as follows:

On E street SE.

4,981.88 cub. yds. grading, at 40 cts. pr. yd	$1,992.75
24,229.62 cub. yds. grading, at 30 cts. pr. yd	7,268.89
24,824.40 " " haul, 1,134 ft. over 200 ft., at 14.17 cts. pr. yd	3,517.62
4,387.10 cub. yds. haul 2,800 ft. over 200 ft., at 35 cts. pr. yd	1,535.48

1,602.22 sq. yds. new brick pavement laid, at $1.00 per yard		$1,602.22
37 sq. yds. new cobblestone pavement, at 70 cts. pr. yd		25.90
1,227 lin'l ft. 5 in. new B. S. curb and setting, at $1.20 per ft		1,472.40
14.1 lin'l ft. granite circ. curb and setting, at $2.05 per foot		28.91
24 running feet 12-inch new gutter flag laid, at 35 cents per foot		8.40
136 running feet 16-inch new gutter flag laid, 48 cents per foot		65.28
2,114 cub. yds. grading, at 30 cents per yard		634.20
2,114 " " haul 2,626 ft. over 200 ft., at 32.82 cts. pr. yd		693.81
Sewer work E st., SE., 2d to 3d (net)		192.76
408 cub. yds. grading, at 30 cts		122.40
408 " " extra haul, at 32.82 cts		133.90
		$19,294.56
Credit by certificates and cash	$16,851.39	
" " material	2,086.54	
		18,937.93
Balance due January 1, 1876		356.63

8 VII.

That July 23, 1872, claimant entered into a contract with the board of public works, known as contract No. 413, for the improvement of Second, Third, and Fourth streets east, between Maryland and Pennsylvania avenues; also for the construction of a sewer on Second street, between East Capitol street and Maryland avenue. That said contract was subsequently extended by the Commissioners of the District of Columbia to provide for additional work on other streets.

VIII.

That under said contract and extension, or under orders of defendant's officers in connection therewith, claimant did work and furnished materials as follows:

On Third street SE.

5,030.5 sq. yds. Belgian pavement, laid, at $3.50 per sq. yd		$17,606.75
176 running feet 16-inch gutter flag, laid, at 48 cents per foot		84.48
198.8 sq. yds. new cobblestone pavement, laid, at 70 cents per yard		139.16
747.4 sq. ft. flag crossing, at 60 cts. pr. ft		448.44
122 running ft. 12 in. gutter flag, at 35 cts. per foot		42.70
1,956 cub. yds. grading, at 30 cts. pr. yd		586.80
1,956 " " haul 2,900 ft. over 200 ft., at 36.25 cts. pr. yd		618.05
Amount retained per vou. 10,833		226.09
1,802 cub. yds. grading, at 30 cts. pr. yd		540.60
3,734 " " " " 40 " " "		1,493.60
5,536 " " haul 1,412 ft. over 200 ft., at 17.65 cts. pr. yd		977.10
Lowering and repairs of water mains		399.30
Amount retained per sewer voucher No. 14129		313.30
		$23,476.37
Credit by certificates	$15,061.03	
" " material	93.51	
		15,154.54
Balance due March 1, 1876		8,321.83

9 IX.

That under said contract and extension, and under orders of defendant's officers in connection therewith, claimant also did work and furnished materials as follows:

On M street south.

3,406.6 sq. ft. 16 in. crossing, laid, at 60 cts		$2,043.96
6,747.10 sq. yds. new brick pavement, laid, at $1.00 per yard		6,747.10
5,723.78 sq. yds. new cobblestone pavement, laid, at 70 cents per yard		4,006.64
6,401 lin'l ft. 5 in. new b. s. curb and setting, at $1.20 per foot		7,681.20
65.8 lin'l ft. granite circ. curb, Gleason pattern, at $2.05 per foot		134.89
101 lin'l ft. granite cir. curb and setting, at $2.05 per foot		207.05
6,025 running feet 12 in. new gutter flag, laid, at 35 cts. per foot		2,108.75
1,481 running ft. 16 in. new gutter flag, laid, at 48 cts		710.88
19,849 cub. yds. grading, at 30 cts. per yard		5,954.70
9,867 " " " " 40 " " "		3,946.80
29,716 " " haul, 736 ft. over 200 ft., at 9.2 cts. per yard		2,733.87
6,973.23 sq. yds. blue rock pavement, laid, at $1.75 per yd		12,203.15
4,097 cub. yds. grading, at 30 cents		1,429.10
4,097 " " extra haul, at 92 cents		376.92
		$50,445.49
Credit by certificates	$33,863.11	
" " material	4,476.54	
		38,339.65
Balance due March 1, 1876		$12,105.74

X.

That defendant is also indebted to the claimant as follows:

Miscellaneous account.

To taking up and removing old material from various streets, as per itemized account rendered to the late board of audit of the District of Columbia		$5,426.74
To erroneous credit claimed by board of public works, account of Aug. 26, 1873		16.50
10 To amount retained under contract No. 264 upon work done on 2nd street SE., between D and E streets, per vou. No. 1045		171.69
To amount retained under contract No. 843, upon work done on "I" street SE., between 2nd and 3rd streets, per account of January 30, 1875		49.29
To hauling new material from property yard		898.54
		$6,562.76

XI.

That, owing to the unforeseen rise in the price of labor after said contracts Nos. 264 and 413 were first executed, the board of public works, by an order duly entered upon its official records, modified said contracts by changing the rates to be paid for extra haul from ½ cent to 1¼ per yard per 100 feet; that such extra haul was fully worth the said increased price; and that in all partial settlements made by defendant's officers the justice, validity, and binding character of said modification have been fully recognised, and payments made accordingly.

Your petitioner therefore alleges that he is justly entitled to receive from the defendant the balances above mentioned, with interest, as provided by law. Wherefore he prays judgment accordingly.

E. E. BARNES,
Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public in and for the District aforesaid, Elias Barnes, who made oath in due form and according to law that the statements made in the foregoing petition are true, and that no

assignment or transfer of the said claim, or any part thereof, has ever been made to the best of his knowledge and belief.

Witness my hand and seal this thirty-first day of March, A. D. 1883.

[SEAL.] ALBION K. PARRIS,
Notary Public.

11 VII.—*Motion for leave to amend petition. Filed April 3, 1883 and allowance of court on same.*

ELIAS E. BARNES
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THE DISTRICT OF COLUMBIA. } No. 47.

Now comes the said claimant, by his attorneys, J. W. and G. L. Douglass, and moves the court for leave to amend his manuscript petition filed March 31, 1883, in the following particular: Insert this paragraph:

XI.

"That owing to the unfor'seen rise in the price of labor after said contracts numbers 264 and 413 were first executed, the board of public works, by an order duly entered upon its official records, modified said contracts by changing the rate to be paid for extra haul from ½ cent to 1¼ cents per yard per 100 feet; that such extra haul was fully worth the said increased price; and that in all partial settlements made by defendant's officers, the justice, validity, and binding character of said modification have been fully recognized and payments made accordingly."

Also correct the figures in the account for the North Carolina avenue grading in conformity with the above.

J. W. & G. L. DOUGLASS,
Attys. for Claimant.

Allowed, April 3, 1883.

WILLIAM A. RICHARDSON,
Judge, &c.

12 VIII.—*Judgment of the court entered Oct. 31, 1887.*

ELIAS E. BARNES, S. J. RITCHIE, INTERVENING,
vs.
THE DISTRICT OF COLUMBIA. } No. 47.

At a Court of Claims held in the city of Washington on the 31st day of October, 1887, judgment was ordered to be entered as follows:

The court, on due consideration of the premises both for and against the District of Columbia and the claimant upon the petition of the claimant and the counter claim of the defendant, finds upon the whole case that the claimant is indebted to the defendant in the sum of eleven thousand and seventy-four dollars and eleven cents, and do order, adjudge, and decree that the defendant, the District of Columbia, do have and recover of and from the said Elias E. Barnes the sum of eleven thousand and seventy-four dollars and eleven cents ($11,074.$\frac{11}{100}$), and that the intervening petition of S. J. Ritchie be dismissed.

BY THE COURT.

13 IX.—*Motion of claimant for new trial filed and allowed.*

On November 18, 1887, the claimant filed a motion for new trial, which was submitted March 28, 1895, and allowed by the court April 1, 1895.

X.—*Stipulation of parties and motion for judgment. Filed November 6, 1895.*

On the 6th day of November, 1895, the claimant filed the report of the referee herein, and stipulation of parties as to judgment, and a motion that judgment be entered in accordance with said report and stipulation.

14 XI.—*Conclusion of law, filed by the court November 11, 1895, and the judgment of the court thereon.*

ELIAS E. BARNES
vs.
THE DISTRICT OF COLUMBIA. } Court of Claims. No. 47, D. C.

The referee in this case having made a report, and no exceptions thereto having been taken by either party, the same is adopted as the findings of the court, and thereon, as a conclusion of law, the court decides that the claimant is entitled to recover from the District of Columbia the sum of thirty-one thousand seven hundred and fifty-four dollars and fifty-seven cents ($31,754.57), due and payable on January 1, 1876, being the amount therein found due; to be divided according to the stipulation of parties filed of record and judgment is to be entered as follows, in accordance with said stipulation:

To Elias E. Barnes the sum of twenty-two thousand three hundred and fifty dollars and fifty-four cents ($22,350.54), and to Samuel J. Ritchie the sum of nine thousand four hundred and four dollars and three cents ($9,404.03).

And it was thereupon ordered that judgment be entered as follows:

That the said Elias E. Barnes do have and recover in the manner provided by the act of June 16, 1880, chapter 243, and under the act of February 13, 1895, the sum of thirty-one thousand seven hundred and fifty-four 57/100 dollars ($31,754.57) upon debts of the District of Columbia due and payable January 1, 1876, said amount to be divided and paid as follows: To Elias E. Barnes twenty-two thousand three hundred and fifty 54/100 dollars ($22,350.54), and to Samuel J. Ritchie nine thousand four hundred and four 03/100 dollars ($9,404.03).

BY THE COURT.

November 11, 1895.

XII.—*Motion of defendant for new trial and order of court granting same.*

On the 20th day of April, 1896, the defendant filed its motion for a new trial, and on the 18th day of May, 1896, the court filed the following order granting said motion, to wit:

ELIAS E. BARNES AND SAMUEL J. RITCHIE
vs.
THE DISTRICT OF COLUMBIA. } No. 47, D. C.

ORDER ON MOTION FOR NEW TRIAL BY DEFENDANT.

A new trial is granted under the provisions of R. S. 1088, it appearing to the court that wrong and injustice have been done to the District of Columbia and to the United States, who are made liable for the payment of one-half of the expenditures of the District by the act of 1878, June 11, ch. 180, sec. 3. (1 Supp. to R. S., 2nd. ed., p. 176.)

BY THE COURT.

Filed May 18, 1896.

XIII.—*Reargument and resubmission of case.*

On the 19th day of December, 1901, and on the 14th, 15th, and 16th days of January, 1902, this case was reargued and resubmitted.

XIV.—*Amended petition. Filed March 11, 1902.*

To the honorable chief justice and judges of the Court of Claims:

The amended petition of Elias E. Barnes respectfully shows:

I.

That on the 29th day of April, 1872, the board of public works awarded to the claimant a contract for grading D street south and North Carolina avenue from Fourth street east to New Jersey avenue at board prices, and directed its contract clerk to prepare a contract in accordance with said award.

16 II.

That at the time of the award of said contract the board prices for excavation in grading streets were:

For each cubic yard of earth, sand, and gravel excavated and hauled 200 feet	30 cents.
For each cubic yard of old graveled streets excavated and hauled 200 feet.	40 cents.
For each cubic yard of rock excavated and hauled 200 feet	$1.00
For each cubic yard of hard clay	60 cents.

and ½ cent per cubic yard for every 100 feet hauled over the first 200 feet.

III.

That the said contract clerk prepared a contract for the work embraced in the said award under date of April 29, 1872, but by mistake omitted to insert therein any stipulated price for the "old gravel," rock, or stiff clay excavation, and the said claimant and the board of public works signed the same without observing the said omission, said contract being numbered 264 in the series of contracts made by said board of public works.

IV.

That at the time of entering into said contract the established grade, as prescribed by law, involved the excavation of about 32,739 cubic yards on North Carolina avenue and about 4,267 cubic yards of excavation on D street, which work was finished about the 22d of August, 1872, by the claimant, which work completed the grading of said streets as required by the terms of said contract.

17 V.

That about January 1, 1873, the Board of Public Works increased their rate of hauling earth from ½ cent per cubic yard per hundred feet to 1¼ cents per cubic yard per hundred feet, and after said date all work of that character was paid for at that price, and the abutting property was assessed at the price for hauling as herein set forth.

VI.

That after the claimant had brought the streets to their established grade they remained at that grade until about the year 1874, when the Commissioners of the District determined to change their grade, and thereupon directed the claimant to further excavate the said streets in order to make their grade conform to the newly established grade, with the understanding and agreement that such additional work should be performed at then existing board rates, and be paid for in certificates, convertible into 3.65 District of Columbia bonds.

VII.

That after entering into the said contract designated contract No. 264 the claimant entered into other contracts with the Board of Public Works and the Commissioners of the District of Columbia, designated as extensions of contract No. 264, dated, respectively, May 21, 1873, June 19, 1875, and December 25, 1875, and including additional work, all of which board prices for work were stipulated to be paid.

VIII.

That after the change of grade of North Carolina avenue the claimant excavated, in order to bring it down to the new grade, 64,573.6
18 cubic yards between New Jersey avenue and Fourth street east, upon which, according to the agreement with the Commissioners

of the District, the haul was to be at the rate of 1¼ cents per hundred feet per cubic yard of haul, which was to be paid for in District of Columbia 3.65 bonds at par.

XI.

That under said contract 264 and its extensions and as extra work thereunder and as reformed by the insertion of the omitted board rates the claimant performed the following work and is entitled to recover the prices herein set forth:

North Carolina avenue—Contract 264.

1.	2,318 lin. ft. 12-inch gutter flag laid, @ 35c	$811.30
2.	533 lin. ft. 16-inch gutter flag laid, @ 48c	255.84
3.	17.7 ft. 5-inch granite curb laid, @ $2.05	36.28
4.	14.1 ft. 5-inch circular curb, Gleason pattern, @ $2.05	28.90
5.	64 cubic yards sewer excavation, @ 40c	25.60
6.	90 ft. 12-inch pipe laid, @ 88c	79.20
7.	1 trap	157.58
8.	3,972.34 square yards graveling, @ 15c	595.85
9.	3,008.92 square yards brick pavement, @ $1	3,008.92
10.	1,376 square yards cobble pavement, @ 70c	963.20
11.	1,210 ft. 16-inch flagging for crossings laid, @ 60c	726.42
12.	1,889.3 ft. 5-inch new curb and setting, @ $1.20	2,267.16
13.	32,793 cub. yards excavation, per meas. Aug. 9, 1872, @ 30c. (p. 337; paid, p. 340), to establish grade	9,837.90
	13½. Haul on same, @ ½c. per 100 ft. (p. 341), 1,100 ft., @ 5½c.	1,803.61
19	14. 20,438 cub. yds. excavation, per meas. Mar. 27, 1875 (p. 342), @ 1¼c., between Coyle grade and new grade	$6,131.40
14½.	3,854 cub. yds. haul 300 ft., @ 1¼c. per 100 ft. (p. 343), @ 3¾c.	144.52
14¾.	16,584 cub. yds. haul 1,100 ft., @ 13¾c. (p. 342), @ 1¼c. per 100 ft.	2,280.30
15.	10,585.6 cub. yds. excavation, per meas. Dec. 2, 1875 (p. 343), @ 30c. per cub. yd., between Coyle grade and new grade	3,175.68
15½.	Haul on 10,585.6 cub. yds., 1,550 ft., @ .1937c. (p. 342), @ 1¼c. per 100 ft	2,050.43
16.	33,550 cub. yds. excavation, per meas. Jan. 22, 1876 (p. 344), @ 30c. per cub. yd., between Coyle grade and new grade	10,065.00
16½.	Haul on 33,550 cub. yds. 1,550 ft., @ .1937c. (p. 344), @ 1¼c. per 100 ft	6,498.63
17.	775.5 lin. ft. 5-inch curb, @ $1.20	930.60
18.	1,077.78 square yards brick pavement, @ $1.00	1,077.78
19.	2,160 square yards graveling, @ 15c	324.00
20.	750 ft. blind drain, @ $1.00	750.00
21.	Additional on clay excavation, 23,704 cub. yds., @ 30c	7,111.20
22.	Excavation under sidewalks, viz, 10 inches depth under 4,086.70 sq. yds. brick pavement, 1,135.19 cub. yds., @ 30c	340.55
	2,044.11 cub. yds. excavation under carriageway, 12 inches depth, under 6,132.34 sq. yds. graveling, @ 30c	613.23
	Haul on above 3,179.30 cub. yds. 1,550 ft., @ .1937c	615.83
		$62,706.91

20 *On D street SE.—Contract 264.*

1.	4,667.11 sq. yds. brick pavement laid, @ $1	$4,667.11
2 and 3.	5,219 cub. yds. excavation, @ 40c., meas. of Dec. 14, 1876, between 2d and 6th sts	2,087.60
4.	19,471 cub. yds. excavation, @ 30c., meas. of Dec. 4, 1876, between 2d and 6th sts	4,877.40
5.	Haul of 2,238 cub. yds. excavation between original surface and established grade, 2,358 feet, @ ½c. per 100 feet, .1179c	278.00
6.	Haul of 20,752 cub. yds. excavation between established grade and new grade, 2,358 feet, @ 1¼c. per 100 ft., .2947c	6,115.61
[6.]	Included in items Nos. 5 and 6.	

7.	1,345 sq. yds. sodding, @ 50c	$672.50
8.	4,266.45 lin. ft. 5″ b. s. curb and setting, @ $1.20	5,119.74
9.	435 lin. ft. 6″ granite curb and setting, @ $1.42	617.70
10.	41.4 lin. ft. granite cir. curb and setting, @ $2.05	84.87
11.	932.4 sq. yds. cobble-stone pavement laid, @ 70c	652.68
12.	3,735.6 sq. yds. graveling, @ 15c	560.34
13.	—— ft. g. granite corners, @ $2.05	67.44
14.	1,133 lin. ft. 12″ sewer and laying, @ 88c	997.04
15.	274 lin. ft. 15″ sewer and laying, @ $1.33	364.42
16.	819 lin. ft. 6″ sewer and laying, @ 36c	294.84
21 17.	111 lin. ft. 12″ x 6″ connections, @ $1.38	$153.18
18.	30 lin. ft. 15″ x 6″ connections, @ $1.80	54.00
19.	2 manholes, 6′ to 8′ deep, @ $42.24	84.48
20.	5 manholes, 8′ to 10′ deep, @ $52.80	264.00
21.	4 manholes, 10′ to 12′ deep, @ $63.36	253.44
22.	1 receiving basin, new pattern	157.58
23.	2 receiving basins	315.16
	2 receiving basins, old pattern, reset, @ $37.00	74.00
24.	1,450.50 cub. yds. excavation, @ 40c	580.20
25.	90 lin. ft. 12″ sewer and laying, @ 88c	79.20
26.	70.5 cub. yds. excavation, @ 40c	28.20
27.	2,561 ft. 12″ gutter flag laid, @ 35c	896.35
28.	456 ft. 16″ bridging, @ 60c	273.60
		$30.670.68

On E street SE.—E street—Contract 264.

1.	4,981.88 cub. yds. grading, @ 40c	$1,992.75
2.	24,229.62 cub. yds. grading, @ 30c	7,268.89
3.	24,824.40 cub. yds. haul 1,134 ft. over 200 ft., @ 1¼c	3,517.62
4.	4,387.10 cub. yds. haul 2,800 ft. over 200 ft., @ 1¼c	1,535.48
5.	1,602.22 sq. yds. brick pavement laid, @ $1.00	1,602.22
6.	37 sq. yds. cobblestone pavement laid, @ 70c	25.90
7.	1,227 lin. ft. 5″ b. s. curb and setting, @ $1.20	1,472.40
8.	14.1 lin. ft. granite cir. curb and setting, @ $2.05	28.91
9.	24 running ft. gutter flag laid, @ 35c	8.40
10.	136 running ft. gutter flag laid, @ 48c	65.28
22 11.	2,114 cub. yds. grading, @ 30c	634.20
12.	2,114 cub. yds. haul 2,626 ft. over 200 ft., @ 1¼c	693.81
13.	Sewer work on E, viz:	
14.	104 lin. ft. 12″ sewer pipe, @ 88c	91.52
15.	48 lin. ft. 6″ sewer pipe, @ 36c	17.28
16.	6 lin. ft. 12″ x 6″ connections, @ $1.38	8.28
17.	1 manhole, 7′ deep	42.24
18.	83.6 cub. yds. excavation, @ 40c	33.44
		$19,038.62

XII.

That on or about the 23d day of July, 1873, the Board of Public Works awarded to the claimant a contract to grade, etc., Second, Third, and Fourth streets S. E. between Maryland and Virginia avenues, at board prices, as set forth in letter of award.

XIII.

That the contract clerk omitted to insert in the said contract the board price for excavating old gravel streets, and the contract with said omission was signed by claimant and the Board of Public Works by mistake, without observing said omission, and the same is entitled to be reformed by the insertion of said omitted price, which contract was numbered 413 in the series of contracts of the Board of Public Works.

XIV.

That under said contract 413 and its extensions the claimant performed the following work on C street and M street for the hereinafter-named prices, for which no final settlement has been had, viz:

23 *On C street SE.—Contract 413.*

1.	2,847.40 sq. yds. brick pavement laid, @ $1	$2,847.40
2.	8.33 sq. yds. old brick pavement relaid, @ 25c	2.08
3.	865.67 sq. yds. cobblestone pavement laid, @ 70c	605.96
4.	2,141 lin. ft. 5″ b. s. curb and setting, @ $1.20	2,569.20
5.	34.5 lin. ft. 5″ curb reset, @ 25c	8.62
6.	10.5 lin. ft. 6″ curb reset, @ 30c	3.15
7.	21.35 lin. ft. 6″ granite cir. curb and setting, @ $2.05	43.77
8.	6.25 lin. ft. 6″ granite cir. curb reset, @ 30c	1.87
9.	2,191 running ft. 12″ gutter flag laid, @ 35c	766.85
10.	207 running ft. 16″ gutter flag laid, @ 48c	99.36
11.	2,848.6 cub. yds. grading, @ 40c	1,139.44
12.	4,469.6 cub. yds. grading, @ 30c	1,340.88
13.	7,318.2 cub. yds. haul, 1,220 ft. over 200 ft., @ $15.25	1,116.02
14.	3,060 sq. ft. graveling, per yd., 15c	459.00
15.	1,326 ft. b. s. curb redressed, @ 20c	265.20
16.	Sewer work, Second to Third st., viz:	
	298 lin. ft. 12″ sewer pipe and laying, @ 88c	262.24
	21 lin. ft. 6″ sewer pipe and laying, @ 36c	7.56
	30 lin. ft. 12″ x 6″ connection pipe and laying, @ $1.38	41.40
	3 manholes, 10′ to 12′ deep, @ $63.36	190.08
	310.72 cub. yds. of excavation, @ 40c	124.25
		$11,894.33

24 *On M street south—M street SW.—Contract 413.*

1.	3,406 sq. ft. 16-in. crossing laid, @ 60c	$2,043.96
2.	6,747.10 sq. yds. brick pavement laid, @ $1	6,747.10
3.	5,723.78 sq. yds. cobblestone pavement laid, @ 70c	4,006.64
4.	6,401 lin. ft. 5″ b. s. curb and setting, @ $1.20	7,681.20
5.	65.8 lin. ft. granite cir. curb, Gleason pattern, @ $2.05	134.89
6.	101 lin. ft. granite cir. curb and setting, @ $2.05	207.05
7.	6,025 running ft. 12″ gutter flag laid, @ 35c	2,108.75
8.	1,481 running ft. 16-in. new gutter flag laid, @ 48c	710.88
9.	19,849 cub. yds. grading, @ 30c	5,954.70
10.	9,867 cub. yds. grading, @ 40c	3,946.80
11.	29,716 cub. yds. haul 736 ft. over 200 ft., @ .092	2,733.87
12.	6,973.23 sq. yds. blue rock pavement laid, @ $1.75 per yd	12,203.15
13.	4,097 cub. yds. grading, @ 30c	1,429.10
14.	4,097 cub. yds. extra haul, @ 1½c	376.92
		$50,285.01

XV.

That under the terms of said contract 413 and the extensions thereof, and under the terms of the understanding with the Commissioners of the District as to price and payment, the claimant performed the following work on Third street SE., between Pennsylvania avenue and Virginia avenue, at prices herein set forth.

25 *Third street—Contract 413.*

1.	5,030.5 sq. yds. Belgian pavement laid, @ $3.50	$17,606.75
2.	See item 4.	
3.	198.8 sq. yds. cobblestone, @ 70c	139.16
4.	747.4 sq. ft. flag crossing, @ 60c	448.44
5.	122 running ft. 12″ gutter flag, @ 35c	42.70
6.	1,956 cubic yds. grading, @ 30c	586.80
7.	1,000 cubic yds. haul, 2,900 ft. over 200 ft., @ 1¼c per 100 ft	362.50
8.	1,802 cubic yds. grading, @ 30c	540.60
9.	3,734 cubic yds. grading, @ 40c	1,493.60
10.	5,536 cubic yds. haul, 1,412 ft. over 200 ft., @ 1¼c	977.10
11.	Lowering and repairs of water mains	399.30
12.	4,521.82 sq. yds. brick pavement laid, @ $1	4,521.82
13.	2,815 running ft. 5″ b. s. curb and setting, @ $1.20	3,378.00
14.	713 running ft. 6″ b. s. curb and setting, @ $1.42	1,012.46
15.	4 running ft. 6″ granite circular curb set, @ $1.42	5.68
16.	18.6 running ft. 6″ granite circular curb reset, @ 30c	5.58
17.	32.3 running ft. 6″ granite circular curb set, @ $2.05	66.20
18.	3 running ft. 6″ b. s. circular curb set, @ $2.05	6.15
19.	6.75 running ft. 4″ b. s. circular curb set, @ $2.05	13.83
20.	288 running ft. 5″ b. s. circular curb reset, @ 25c	72.00
21.	22,248.83 cubic yds. excavation, @ 30c	6,674.64
	22. 7,078 cubic yds. excavation, @ 40c	2,831.20
26	23*a*. 7,078 cubic yds. haul, 1,655 feet over 200 ft., @ ½c., .0827c	$585.35
	23*b*. 22,248.83 cubic yds. haul, 1,655 feet over 200 ft., @ 1¼c., .2068c	4,601.05
24.	918.13 sq. yds. sodding, @ 50c	459.06
25.	1,219 lin. ft. 15″ pipe and laying, @ $1.33	1,621.27
26.	3 manholes, 8′–10′ deep, @ $52.80	158.40
27.	9 manholes, 10′–12′ deep, @ $63.36	570.24
28.	2 manholes, 12′–14′ deep, @ $73.92	147.84
29.	2 manholes, 14′–16′ deep, @ $84.48	168.96
30.	1 manhole, 16′–18′ deep	95.04
31.	Additional on 1,630.14 cubic yds. excavation over 16 ft. deep	233.15
32.	8 receiving basins, @ $138.80	1,110.40
33.	2 receiving basins and traps, @ $145.38	290.76
34.	1,103 lin. ft. 36″ sewer, 168,851 bricks, @ $23 per M	3,883.57
36.	4,555.54 cubic yds. excavation, @ 40c	1,822.21
37.	159 lin. ft. 12″ gutter flag, @ 88c	139.92
38.	9 lin. ft. 18″ gutter flag, @ $1.62	14.58
39.	609 lin. ft. 6″ gutter flag, @ 36c	219.20
40.	34 lin. ft. 15 x 6 connections, @ $1.80	61.20
		$57,366.75

XVI.

The claimant also did the following work by order of the Board of Public Works, but not under written contract, admitted by defendant to be correct and of which defendant received the full benefit:

	441.33 sq. yds. brick pavement laid, @ $1	$441.33
	301.5 lin. ft. 5″ b. s. curb, @ $1.20	361.80
	119 cub. yds. grading, @ 30c	35.70
	119 cub. yds. hauled 1,320 ft. over 200 ft., @ 16½c	19.63
27	3 lin. ft. 15″ pipe and laying, @ $1.33	3.99
	24 lin. ft. 6″ pipe and laying, @ 36c	8.64
	3 lin. ft. 18″ pipe and laying, @ $1.62	4.86
	2 manholes, 10′–12′ deep, @ $63.36	126.72
	1 manhole, 18′–20′ deep	105.60
	462.9 lin. ft. 36″ brick sewer, 80,081.7 brick, @ $23 per M	1,841.88
	2,009.39 cub. yds. excavation, @ 40c	803.75
	Additional for 955.57 cub. yds. excavation over 16 ft. deep, @ 37c	353.56
	9 yds. hauled, @ 1¼c	19.63
	9 yds. hauled, @ ½c	7.85
		$4,095.68

XVII.

Said Barnes also, in pursuance of his several contracts with the defendants and the several extensions thereof, dressed and joined old curb to amount in value, at regular prices, of $2,643.48, as stated in the first paragraph of his amended petition filed and allowed April 14, 1887. Conceded by defendant.

XVIII.

The claimant has received payments on account of the work herein elsewhere mentioned aggregating	$178,949.57
And materials of the value of	22,748.11
	$201,697.68

XIX.

That the claimant is entitled for work and labor done and materials furnished on his unsettled accounts the sums of, viz:

28 North Carolina avenue	$62,706.91
C street	11,894.33
D street	30,670.68
E street	19,038.62
Third street	57,366.75
M street	50,285.01
I and Second streets	4,095.68
Jointing curb	2,043.48
	$238,701.46
On which he has been paid in 3.65 bonds and materials	201,697.68
Leaving balance due and payable March 14, 1876	$36,003.78

And the petitioner claims $36,003.78 as of a debt due and payable March 14, 1876.

ELIAS E. BARNES.

JOHN W. DOUGLASS,
Attorney of Record.

DISTRICT OF COLUMBIA, *ss:*

Elias E. Barnes, being duly sworn, says he has heard read the foregoing petition by him subscribed and knows the contents thereof, and that the matters and things therein set forth of his own knowledge are true, and those stated upon information and belief he believes to be true.

E. E. BARNES.

Sworn and subscribed before me this 5th day of March, 1902.

ISAAC C. SLATER,
Notary Public.

29 XII.—*Findings of fact and conclusions of law filed by the court March 31, 1902.*

ELIAS E. BARNES
v.
THE DISTRICT OF COLUMBIA.

This case having been heard before the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

Prior to April 29, 1872, the board of public works of the District of Columbia had, by order entered on their records, fixed the price of certain work to be done in the improvement of the streets in the city of Washington, among which were the following:

"For grading from and after January 22, 1872, 30 cents per cubic yard, including the hauling of the earth excavated not to exceed 200 feet; and for each 200 feet hauled beyond the first 200 feet 1 cent additional per cubic yard.

"For grading old graveled streets to a depth of 2 feet, 40 cents per cubic yard."

And on said April 29, 1872, the said board, as shown by their records, awarded to the claimant herein at the rate so fixed, among others, a contract of which the claimant was notified in writing about which there is no controversy, and the contract clerk of said board was directed to prepare the contract accordingly.

The said clerk prepared a contract designated as Contract No. 264, which was executed by the parties in these words:

"CONTRACT NO. 264.

"This contract, made and concluded this twenty-ninth day of April, in the year one thousand eight hundred and seventy-two, by the board of public works of the District of Columbia, of the first part, and Elias E. Barnes, of Washington, D. C., of the second part, witnesseth:

"First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed—

"To furnish at his own proper cost and expense all the necessary materials and labor, and in a good, firm, and substantial manner to
30 grade D street south from Fourth street east to New Jersey avenue, in the city of Washington, D. C.; also to grade North Carolina avenue from Fourth street east to New Jersey avenue, in the city of Washington, D. C.

"Also to construct, with the necessary manholes, an eighteen (18) inch pipe sewer from Providence Hospital, at the corner of said D and Second streets SE., through the Government reservation at the intersection of D street SE. and North Carolina avenue, to the main sewer on

said D street SE.; also, so soon as the connections of said sewer, as above, are made and completed, to take up and remove the old brick sewer now down and through said Government reservation, the work of said grading and sewering to be executed, in every respect, in conformity with the specifications following, to wit:

* * * * * * *

"Second. It is further agreed that the said party of the first part shall appoint, from time to time, such person or persons as may be by said party deemed proper, to inspect the material to be furnished and the work to be done under this contract, and that such person or persons shall have any and all opportunity and privileges which may be necessary to enable them to faithfully make the inspection aforesaid.

"Third. It is further agreed that the work under this contract shall be commenced on or before the fourth day of May, one thousand eight hundred and seventy-two.

"Fourth. It is further agreed that the said party of the first part may, on notice to the party of the second part, suspend work under this contract; but if not suspended it shall be completed within ninety days from the date fixed for its commencement, and that the said work shall not be sublet without the consent in writing of the said party of the first part. And any subletting or assignment without such consent shall work a forfeiture of this contract.

* * * * * * *

"Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor.

* * * * * * *

"Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of the board of public works aforesaid, and that whenever the said chief engineer aforesaid shall certify, in writing, that the party of the second part completely performed this contract on his part, and shall submit, with said certificate, his estimate of the amount due the party of the second part, then, within thirty days, as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made, as hereinafter mentioned.

"And it is further expressly agreed that no money shall become due and payable under this contract except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agrees that he shall not be entitled to demand or receive
31 payment for any portion of the aforesaid work except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him,

excepting such sum or sums as may be retained under any provision of this contract; provided that partial payments may be made, under direction of the board, otherwise than upon the estimates of the engineer, as provided above, if, in the opinion of the board, the vigorous prosecution of the work will be promoted thereby.

* * * * * * *

"Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

"Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two hundred (200) feet, and one cent additional per cubic yard for every two hundred (200) feet beyond the above.

"Eighteen (18) inch pipe, per lin. ft., $1.62.

Manholes:	
6 ft. deep or under	$31.68
Over 6 ft. deep and not more than 8 ft. deep	42.24
" 8 " " " " " " 10 " "	52.80
" 10 " " " " " " 12 " "	63.36
" 12 " "	73.92

"Excavation and refilling, forty (40) cents per cubic yard, to be measured in excavation only.

"Taking up and removing old brick sewer.

"Which said sums or prices the said party of the first part shall pay to the said party of the second part as herein provided.

"Eleventh. It is further agreed that the measurements shall be made by the engineer of the board or his assistants. * * *

"In witness whereof, &c. * * *"

II.

That by mistake in the drafting of said contract the rate of 40 cents for grading old gravel streets to a depth of 2 feet was omitted therefrom; that said board of public works and said claimant, by mutual mistake, executed said contract without observing said omission.

III.

That under and pursuant to said contract the claimant excavated on North Carolina avenue, to bring said street to the then established grade, 32,739 cubic yards, and on D street—both in said city—about 4,267 cubic yards of excavation, which work was completed about August 22, 1872.

IV.

In September, 1873, the board of public works increased the price for hauling earth from 1 cent per cubic yard for 200 feet to 1¼ cents
32 per cubic yard for 100 feet of hauling beyond the first 200 feet, and made said rate applicable to all work done after January 1, 1873.

V.

Thereafter, in 1874, the Commissioners of the District of Columbia established a new grade for North Carolina avenue and directed the claimant to further excavate said street, in order to conform the same to the newly established grade, with the understanding and agreement, verbally made, that the claimant should be paid therefor the then existing board rates in certificates, convertible into bonds of the District of Columbia bearing interest at the rate of 3.65 per cent.

VI.

That subsequent to the execution of said contract No. 264, set forth in the first finding herein, said claimant entered into other contracts with the board of public works and the Commissioners of said District, the first of which was effected by said board and the residue by the Commissioners, designated as extensions of said contract No. 264, in these words:

"FIRST EXTENSION OF CONTRACT 264

"*By and between board of public works and said Barnes.*

"It is hereby agreed that this contract, with its various terms, conditions, and stipulations (except as respects the time of execution), shall be extended so as to embrace the setting of curbstones and the laying and putting down of brick foot pavements on North Carolina avenue, between New Jersey avenue and Fourth street SE., in the city of Washington, D. C.

"Also the setting the curbstones and the laying and putting down of the brick foot pavements on D street SE., between New Jersey avenue and Fourth street SE., in the city of Washington, D. C.

"Also the gravelling of said D street SE., between Sixth and Seventh streets SE., in the city of Washington, D. C.

"Also the gravelling of the carriageway of North Carolina avenue from Pennsylvania avenue to New Jersey avenue, in the city of Washington, D. C.

"Also the grading, the setting of curbstones, and the laying and putting down of the brick foot pavements on D street SE. from Fourth to Sixth street SE., and the terracing of said D street SE. from Second to Fourth street SE., in the city of Washington, D. C.

"Also the grading of E street SE. from Second to Sixth streets SE., in the city of Washington, D. C.

"The said work to be paid for at board rates for said work, and to be begun and completed immediately, and said work to be executed in every respect in conformity with the accompanying specifications.

"Witness our hands and seals the twenty-first day of May, A. D. 1873."

33 "SECOND EXTENSION OF CONTRACT NO. 264.

"For and in consideration of the stipulations hereinafter contained it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 264 in the series of contracts made by the board of public works of the District of Columbia

be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, viz:

"Grade M street south, between 3d street east and James Creek Canal.

"It is further agreed that the said lias E. Barnes shall receive the prices established and paid by the board of public works for work of similar character, provided that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

"It is further agreed that the work herein specified shall be completed by the first day of November, 1875, under penalty of forfeiture of all right and title to perform the same.

"In witness whereof the Commissioners of the District of Columbia, successors to the board of public works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purposes,' approved June 20, 1874, and the party of the second part to these presents have hereunto set their hands and seals this 19th day of June, 1875."

"THIRD EXTENSION OF CONTRACT No. 264.

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 264 in a series of contracts made by the board of public works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit:

"Replace all suitable old material on E street south, between 2nd and 6th streets east.

"It is further agreed that the work herein specified shall be completed by the 30 day of Dec., 1875, under penalty of forfeiture of all right and title to perform the same.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the board of public works for work of similar character; provided, that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

"In witness whereof the Commissioners of the District of Columbia, successors of the late board of public works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia and for other purposes,' approved June 20, 1874, and the party of the second part to these presents has hereunto set his hands and seal this 21st day of December, 1875."

34 VII.

That after the change of grade of North Carolina avenue, as aforesaid, the claimant excavated 64,573.6 cubic yards, measured by the engineer officers of said District March and December, 1875, and January, 1876, for which excavation, according to the verbal agreement with the Commissioners aforesaid, the claimant was to receive the rate

so established and paid by the board of public works, including 1¼ cents per cubic yard for every 100 feet of excavation hauled beyond the first 200 feet, which was to be paid in bonds of the District of Columbia as aforesaid.

VIII.

That subsequent to the execution of said contract No. 264, and before the Commissioners of said District had directed the claimant to proceed to a further excavation of North Carolina avenue to bring it to the new grade so established by said Commissioners, the board of public works had established by payment to several contractors, i. e., four or five, for like work, the rate of 60 cents per cubic yard for stiff-clay excavation, which the court finds was a reasonable price therefor.

IX.

That under said contract No. 264 and the extensions thereof, and as re-formed by the insertion of the omitted rate for old gravel streets and the additional for clay excavation, and the extra work performed under the verbal agreement of the Commissioners of said District as aforesaid, which work was accepted by said Commissioners and the District received the benefit thereof, the claimant performed the following work:

North Carolina avenue.—Contract 264.

1.	2,318 lin. ft. 12-inch gutter flag laid, at 35c	$811.30
2.	533 lin. ft. 16-inch gutter flag laid, at 48c	255.84
3.	17.7 ft. 5-inch granite curb laid, at $2.05	36.28
4.	14.1 ft. 5-inch circular curb, Gleason pattern, at $2.05	28.90
5.	64 cubic yards sewer excavation, at 40c	25.60
6.	90 ft. 12-inch pipe laid, at 88c	79.20
7.	1 trap	157.58
8.	3,972.34 square yards graveling, at 15c	595.85
9.	3,008.92 square yards brick pavement, at $1	3,008.92
10.	1,376 square yards cobble pavement, at 70c	963.20
11.	1,210 ft. 16-inch flagging for crossings, laid, at 60c	726.00
12.	1,889.3 ft. 5-inch new curb and setting, at $1.20	2,267.16
13.	32,793 cub. yards excavation, per meas. Aug. 9, 1872, at 30c., to established grade	9,837.90
14.	Haul on same, at ½c. per 100 ft. 1,100 ft., at 5½c	1,803.61
15.	20,438 cub. yds. excavation, per meas. Mar. 27, 1875, at 30c., between Coyle grade and new grade	6,131.40
16.	3,854 cub. yds. haul 300 ft., at 1½c. per 100 ft., at 3⅜c	144.52
17.	16,584 cub. yds. haul 1,100 ft., at 13⅜c., at 1½c. per 100 ft	2,280.30
18.	10,585.6 cub. yds. excavation, per meas. Dec. 2, 1875, at 30c. per cub. yd., between Coyle grade and new grade	3,175.68
19.	Haul on 10,585.6 cub. yds., 1,550 ft., at .1937c., at 1½c. per 100 ft	2,050.43
20.	33,550 cub. yds. excavation, per meas. Jan. 22, 1876, at 30c. per cub. yd., between Coyle grade and new grade	10,065.00
35 21.	Haul on 33,550 cub. yds., 1,550 ft., at .1937c., at 1¼ c. per 100 ft.	6,498.63
22.	775.5 lin. ft. 5-inch curb, at $1.20	930.60
23.	1,077.78 square yards brick pavement, at $1.00	1,077.78
24.	2,160 square yards graveling, at 15c	324.00
25.	750 ft. blind drain, at $1.00	750.00
26.	Additional stiff-clay excavation, 23,704 cub. yds., at 30c. (done after 1874)	7,111.20
27.	Excavation under sidewalks, viz, 10 inches depth under 4,086.70 sq. yds. brick pavement, 1,135.19 cub. yds., at 30c	340.55
	2,044.11 cub. yds. excavation under carriageway, 12 inches depth, under 6,132.34 sq. yds. graveling, at 30c	613.23
	Haul on above 3,179.30 cub. yds., 1,550 ft., at .1937c	615.83
	Total	62,706.49

The excavation, as well as the rate of 1¼ cents per haul therefor mentioned in items 15 to 21, both inclusive, and item 27 were for work done under the verbal agreement with the Commissioners of said District as aforesaid, as was also the additional or clay excavation mentioned in item 26. The excavation mentioned in item 27 is not included in either of the measurements mentioned in items 13, 15, 18, or 20.

D street SE.—Contract 264.

1.	4,667.11 sq. yds. brick pavement laid, at $1	$4,667.11
2.	5,219 cub. yds. excavation, at 40c., meas. of Dec. 14, 1876, between 2d and 6th sts	2,087.60
3.	19,471 cub. yds. excavation, at 30c., meas. of Dec. 4, 1876, between 2d and 6th sts	5,841.30
4.	Haul of 2,238 cub. yds. excavation between original surface and established grade, 2,358 feet, at ½c. per 100 feet, .1179c	263.86
5.	Haul of 20,752 cub. yds. excavation between established grade and new grade, 2,358 feet, at 1¼c. per 100 ft., .2947c., as per agreement with Commissioners	6,115.61
6.	1,345 sq. yds. sodding, at 50c	672.50
7.	4,266.45 lin. ft. 5″ b. s. curb and setting, at $1.20	5,119.74
8.	435 lin. ft. 6″ granite curb and setting, at $1.42	617.70
9.	41.4 lin. ft. granite cir. curb and setting, at $2.05	84.87
10.	932.4 sq. yds. cobblestone pavement laid, at 70c	652.68
11.	3,735.6 sq. yds. graveling, at 15c	560.34
12.	—— ft. g. granite corners, at $2.05	67.44
13.	1,133 lin. ft. 12″ sewer and laying, at 88c	997.04
14.	274 lin. ft. 15″ sewer and laying, at $1.33	364.42
15.	819 lin. ft. 6″ sewer and laying, at 36c	294.84
16.	111 lin. ft. 12″ x 6″ connections, at $1.38	153.18
17.	30 lin. ft. 15″ x 6″ connections, at $1.80	54.00
18.	2 manholes, 6′ to 8′ deep, at $42.24	84.48
19.	5 manholes, 8′ to 10′ deep, at $52.80	264.00
20.	4 manholes, 10′ to 12′ deep, at $63.36	253.44
21.	1 receiving basin, new pattern	157.58
22.	2 receiving basins	315.16
	2 receiving basins, old pattern, reset, at $37.00	74.00
23.	1,450.50 cub. yds. excavation, at 40c., under extension	580.20
24.	90 lin. ft. 12″ sewer and laying, at 88c	79.20
25.	70.5 cub. yds. excavation, at 40c., under extension	28.20
26.	2,561 ft. 12″ gutter flag laid, at 35c	896.35
27.	456 ft. 16″ bridging, at 60c	273.60
		31,620.44

The total excavation, according to the final measurement, was.... 24,690 cub. yds.
On 1,700 cub. yds. no haul was allowed, presumably because it was hauled less than 200 feet ..... 22,990—2,358 ft.
1,700—no haul.
24,690

36 *E street SE.—No change.—E street—Contract 264.*

1.	4,981.88 cub. yds. grading, at 40c	$1,992.75
2.	24,229.62 cub. yds. grading, at 30c	7,268.89
3.	24,824.40 cub. yds. haul 1,134 ft. over 200 ft., at 1¼c	3,517.62
4.	4,387.10 cub. yds. haul 2,800 ft. over 200 ft., at 1¼c	1,535.48
5.	1,602.22 sq. yds. brick pavement laid, at $1.00	1,602.22
6.	37 sq. yds. cobble-stone pavement laid, at 70c	25.90
7.	1,227 lin. ft. 5″ b. s. curb and setting, at $1.20	1,472.40
8.	14 1 lin. ft. granite cir. curb and setting, at $2.05	28.91
9.	24 running ft. gutter flag laid, at 35c	8.40
10.	136 running ft. gutter flag laid, at 48c	65.28
11.	2,114 cub. yds. grading, at 30c	634.20
12.	2,114 cub. yds. haul 2,626 ft. over 200 ft., at 1¼c	693.81

13. Sewer work on E, viz:	
14. 104 lin. ft. 12″ sewer pipe, at 88c	$91.52
15. 48 lin. ft. 6″ sewer pipe, at 36c	17.28
16. 6 lin. ft. 12″ x 6″ connections, at $1.38	8.28
17. 1 manhole 7′ deep	42.24
18. 83.6 cub. yds. excavation, at 40c	33.44
	19,038.62

X.

On July 23, 1872, the board of public works awarded to the claimant another contract, designated as contract No. 413, in these words:

"CONTRACT No. 413.

"This contract, made and concluded this twenty-third day of July, in the year one thousand eight hundred and seventy-two, by and between * * * the board of public works of the District of Columbia, of the first part, and Elias E. Barnes, of Washington, D. C., of the second part, witnesseth:

"First, that the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish, at his own proper cost and expense, all the necessary materials and labor, and, in a good, firm, and substantial manner to grade, set the curbstones, and lay and put down the brick foot pavements on Second street east, between Maryland and Virginia avenues; on Third street east, between Maryland and Virginia avenues, and on Fourth street east, between Maryland and Virginia avenues, and on Fourth street east, between Maryland and Pennsylvania avenues, in the city of Washington, D. C. Also to construct a fifteen (15′) inch pipe sewer on the west side of said Second street east, between East Capitol street and Pennsylvania avenue, with the necessary manholes and traps; the work of said grading, curbing, brick paving, and sewering to be done and completed in accordance with the specifications following, to wit:

* * * * * * *

"Sixth and eighth. [Same as sixth and eighth in contract No. 264.]

* * * * * * *

"Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution
37 of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

"Grading, thirty (30) cents per cubic yards, including the first two hundred (200) feet of hauling.

"For every additional two hundred (200) feet of hauling per cubic yard, one (1) cent.

"Setting curbstones (new 8″) per lin. ft., forty (40) cents.
" " (" 6″) " " " thirty (30) "
" " (" 5″) " " " twenty-five (25) cents.
"Resetting " (old 4″) " " " fifteen (15) cents.

"Laying brick pavement, new, per sq. y'd, eighty (80) cents.
"Relaying brick pavement, old, per sq. y'd, twenty-five (25) cents.
"Provided, that bricks shall be furnished by the board at a price not exceeding eleven dollars and fifty ($11.50) cents per thousand.
"Fifteen (15″) inch pipe per lin. ft., $1.33.
"Six (6″) inch pipe " " " thirty-six (36) cents.

Manholes—	
6 feet deep or under	$31.68
Over 6 feet deep and more than 8 feet	42.24
" 8 " " " " " 10 "	52.80
" 10 " " " " " 12 "	63.36
" 12 " "	73.92
Traps—	
Old corporation patterns	145.38
Chase's pattern	114.58

"Which said sums or prices the said party of the first part shall pay to the said party of the second part, as herein provided.
"Eleventh. It is further agreed that the measurements shall be made by the engineer of the said party of the first part, or his assistants."
At the time said contract was awarded the contract clerk of said board notified the claimant in writing, about which there is no controversy, that said contract had been awarded to him at board rates, but the court finds that the evidence fails to show that the board awarded said contract at said rates, or at any other rates than those set forth in the contract aforesaid, or that any mistake was made in the omission therefrom of the rate for old gravel streets.

XI.

That subsequent to the execution of said contract No. 413 the claimant entered into other contracts with the Commissioners of said District, known as extensions thereof, in these words:

"First Extension of Contract No. 413.

"For and in consideration of the stipulations hereinafter contained it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 413 in the series of contracts made by the board of public works of the District of Columbia be, and the same is hereby, extended with its various terms, conditions, and stipulations to embrace the following work, to wit:
"Grade 3d street east, between Virginia avenue and Eastern Branch; N street south, between 2nd and 4th streets east; M street south, between 2nd and 4th street east, and reset the curbs and relay the
38 brick foot-pavements on said streets where ordered by the engineer of the D. C.
"It is further agreed that the said Elias E. Barnes shall receive the price established and paid by the board of public works for work of similar character, provided payment shall be made in the bonds issued by the sinking-fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value. * * *

"In witness whereof the said District of Columbia has caused this instrument to be signed by the Commissioners of said District, appointed under the act of Congress entitled 'An act for the government of the District of Colnmbia, and for other purposes,' approved June 20, 1874, and the common seal of said District to be hereto affixed, and the party of the second part to these presents has hereunto set his hand and seal this 20th day of May, 1875."

"SECOND EXTENSION OF CONTRACT NO. 413.

"(Memorandum in red ink:) Cancelled so far as relates to cobblestone pavement on M st. south, bet. S. Cap. st. and 4½ street west, and bet. New Jersey ave. and 4th street east. (See extension same No. 413.)

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 413, in the series of contracts made by the board of public works of the District of Columbia, be, and the same is hereby, extended with its various terms, conditions, and stipulations to embrace the following work, to wit:

"Set the curbs and lay the brick sidewalks on M street south, between 2nd street west and 4th street east, according to specifications.

"Also grade, set the curbs, lay the brick pavements, and lay and put down the 12-inch sewers where ordered on C street south, from 2nd street east to South Capitol street, according to specifications. All suitable old material to be replaced.

"Also lay cobblestone pavement on M street south, between 4½ street west and 4th street east.

"It is further agreed that the work specified to be done under this agreement shall be completed by the 1st day of November, 1875; and if not so completed by said date the party of the second part hereto shall forfeit all right and title to perform the work herein described.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the board of public works of the District of Columbia for work of similar character; provided that payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value. * * *

"In witness whereof the Commissioners of the District of Columbia, successors to the board of public works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purposes,' approved June 20, 1874, and the party of the second part to these presents have hereunto set their hands and seals this 19th day of August, 1875."

39 "THIRD EXTENSION OF CONTRACT NO. 413.

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 413, in the series of contracts made by the board of public works of the District of Columbia, be, and the same is hereby, extended with its various terms, conditions, and stip-

ulations, to embrace the following work according to specifications hereunto annexed, to wit:

"Lay and put down Belgian granite block pavement on the carriageway of 3d street east, between D street south and Virginia avenue, and the blue-rock pavement on 3d street east, between Virgina avenue and N street south, and gravel the roadway of D street south, between New Jersey avenue and 6th street east; grade and relay the old material on C street south, between 2d and 3d streets east. Also grade, set the curbs, and lay brick pavements on D street south, between New Jersey avenue and South Capitol street.

"It is further agreed that the work specified herein shall be completed by the 30th day of November, 1875, under penalty of forfeiture of all right and title to perform the same.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the board of public works for work of similar character: Provided, That payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress, approved June 20, 1874, which bonds shall be accepted and received at their par value.

* * * * * * *

"In witness whereof the Commissioners of the District of Columbia, successors to the late board of public works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purposes,' approved June 20, 1874, and the party of the second part to these presents has hereunto set his hand and seal this 12th day of Nov., 1875."

"FOURTH EXTENSION OF CONTRACT NO. 413.

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and "Elias E. Barnes," that contract No. 413, in the series of contracts made by the board of public works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit:

"Lay and put down bluestone pavement on the carriage way of M street south, between South Capitol street and 4½ street west, and between New Jersey avenue and Fourth street east (this work is in lieu of cobblestone pavement on said street between the points named).

"It is further agreed that the work herein specified shall be completed by the 30th day of December, 1875, under penalty of forfeiture of all right and title to perform the same.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the board of public works for work of similar character: Provided, That payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

* * * * * * *

"In witness whereof the Commissioners of the District of Columbia, successors to the late board of public works, etc., etc."

XII.

Under said contract 413 and the several extensions thereof set forth in the preceding finding, the claimant performed the following work on C street southeast and M street southwest at the prices hereinafter named—that is to say:

C street SE.—Contract 413.

1.	2,847.40 sq. yds. brick pavement laid, at $1	$2,847.40
2.	8.33 sq. yds. old brick pavement relaid, at 25c	2.08
3.	865.67 sq. yds. cobblestone pavement laid, at 70c	605.96
4.	2,141 lin. ft. 5″ b. s. curb and setting, at $1.20	2,569.20
5.	34.5 lin. ft. 5″ curb reset, at 25c	8.62
6.	10.5 lin. ft. 6″ curb reset, at 30c	3.15
7.	21.35 lin. ft. 6″ granite cir. curb and setting, at $2.05	43.77
8.	6.25 lin. ft. 6″ granife cir. curb reset, at 30c	1.87
9.	2,191 running ft. 12″ gutter flag laid, at 35c	766.85
10.	207 running ft. 16″ gutter flag laid, at 48c	99.36
11.	2,848.6 cub. yds. grading, at 40c	1,139.44
12.	4,469.6 cub. yds. grading, at 30c	1,340.88
13.	7,318.2 cub. yds. haul, 1,220 ft. over 200 ft., at 1¼c.=0.1525	1,116.02
14.	3,060 sq. ft. graveling, per yd. 15c	459.00
15.	1,326 ft. b. s. curb redressed, at 20c	265.20
16.	Sewer work, Second to Third st., viz:	
	298 lin. ft. 12″ sewer pipe and laying, at 88c	262.24
	21 lin. ft. 6″ sewer pipe and laying, at 36c	7.56
	30 lin. ft. 12″ x 6″ connection pipe and laying, at $1.38	41.40
	3 manholes 10′ to 12′ deep, at $63.36	190.08
	310.72 cub. yds. of excavation, at 40c	124.29
		11,894.37

M street SW.—Contract 413.

1.	3,406 sq. ft. 16-in. crossing laid, at 60c	$2,043.60
2.	6,747.10 sq. yds. brick pavement laid, at $1	6,747.10
3.	5,723.78 sq. yds. cobblestone pavement laid, at 70c	4,006.64
4.	6,401 lin. ft. 5″ b. s. curb and setting, at $1.20	7,681.20
5.	65.8 lin. ft. granite cir. curb, Gleason pattern, at $2.05	134.89
6.	101 lin. ft. granite cir. curb and setting, at $2.05	207.05
7.	6,025 running ft. 12″ gutter flag laid, at 35c	2,108.75
8.	1,481 running ft. 16 in. new gutter flag laid, at 48c	710.88
9.	19,849 cub. yds. grading, at 30c	5,954.70
10.	9,867 cub. yds. grading, at 40c	3,946.80
11.	29,716 cub. yds. haul 736 ft. over 200 ft., at .092	2,733.87
12.	6,973.23 sq. yds. blue-rock pavement laid, at $1.75 per yd	12,203.15
13.	4,097 cub. yds. grading, at 30c	1,229.10
14.	4,097 cub. yds. extra haul, at 1¼c	376.92
		50,084.65

XIII.

At the time of the award of said contract 413 the established grade of Third street between Pennsylvania avenue and Virginia avenue
41 required the excavation of 7,078 cubic yards of earth, which was completed in 1873.

That by reason of the change of grade of North Carolina avenue by the Commissioners in 1874, as hereinbefore set forth, it became necessary to further grade said Third street to conform to the new grade so established; and under the terms of said contract 413 and the extensions thereof, and by the direction of said Commissioners, and with the agreement and understanding that said Commissioners would pay him

the board rates for the extra excavation and for the haul in 3.65 per cent bonds of said District, as set forth in finding 5, the claimant performed the following work on Third street, to wit:

Third street.—Contract 413.

1.	5,030.5 sq. yds. Belgian pavement laid, at $3.50	$17,606.75
2.	See item 4.	
3.	198.8 sq. yds. cobblestone, at 70c	139.16
4.	747.4 sq. ft. flag crossing, at 60c	448.44
5.	122 running ft. 12″ gutter flag, at 35c	42.70
6.	1,956 cubic yds. grading, at 30c	586.80
7.	1,000 cubic yds. haul, 2,900 ft. over 200 ft., at 1¼c. per 100 ft	362.50
8.	1,802 cubic yds. grading, at 30c	540.60
9.	3,734 cubic yds. grading, at 40c	1,493.60
10.	5,536 cubic yds. haul, 1,412 ft. over 200, at 1¼c	977.10
11.	Lowering and repairs of water mains	399.30
12.	4,521.82 sq. yds. brick pavement laid, at $1	4,521.82
13.	2,815 running ft. 5″ b. s. curb and setting, at $1.20	3,378.00
14.	713 running ft. 6″ b. s. curb and setting, at $1.42	1,012.46
15.	4 running ft. 6″ granite circular curb set, at $1.42	5.68
16.	18.6 running ft. 6″ granite circular curb reset, at 30c	5.58
17.	32.3 running ft. 6″ granite circular curb set, at $2.05	66.20
18.	3 running ft. 6″ b. s. circular curb set, at $2.05	6.15
19.	6.75 running ft. 4″ b. s. circular curb set, at $2.05	13.83
20.	288 running ft. 5″ b. s. circular curb reset, at 25c	72.00
21.	22,248.83 cubic yds. excavation, at 30c	6,674.64
22.	7,078 cubic yds. excavation, at 30c	2,123.40
23.	7,078 cubic yds. haul, 1,655 feet over 200 ft., at ¼c., .0827c	585.35
24.	22,248.83 cubic yds. haul, 1,655 feet over 200 ft., at 1¼c., .2068c	4,601.05
25.	918.13 sq. yds. sodding, at 50c	459.06
26.	1,219 lin. ft. 15″ pipe and laying, at $1.33	1,621.27
27.	3 manholes, 8′–10′ deep, at $52.80	158.40
28.	9 manholes, 10′–12′ deep, at $63.36	570.24
29.	2 manholes, 12′–14′ deep, at $73.92	147.84
30.	2 manholes, 14′–16′ deep, at $84.48	168.96
31.	1 manhole, 16′–18′ deep	95.04
32.	Additional on 1,630.14 cubic yds. excavation over 16 ft. deep	233.15
33.	8 receiving basins, at $138.80	1,110.40
34.	2 receiving basins and traps, at $145.38	290.76
35.	1,103 lin. ft. 36″ sewer, 168,851 bricks, at $23 per M	3,883.57
36.	4,555.54 cubic yds. excavation, at 40c	1,822.21
37.	159 lin. ft. 12″ gutter flag, at 88c	139.92
38.	9 lin. ft. 18″ gutter flag, at $1.62	14.58
39.	609 lin. ft. 6″ gutter flag, at 36c	219.24
40.	34 lin. ft. 15x6 connections, at $1.80	61.20
	Total	56,658.95

The excavation and haul mentioned in items 21 and 24 were for work done in 1874 and thereafter under the direction and verbal agreement of the Commissioners of said District as aforesaid, which work was accepted by said Commissioners and the District received the benefit thereof.

42 XIV.

The claimant also did the following work by order of the board of public works, but not under written contract admitted by defendant to be correct and of which defendant received the full benefit:

441.33 sq yds. brick pavement laid, at $1	$441.33
301.5 lin. ft. 5″ b. s. curb, at $1.20	361.80
119 cub. yds. grading, at 30c	35.70
119 cub. yds. hauled 1,320 ft. over 200 ft., at 16½c	19.63

3 lin. ft. 15″ pipe and laying, at $1.33	$3.99
24 lin. ft. 6″ pipe and laying, at 36c	8.64
3 lin. ft. 18″ pipe and laying, at $1.62	4.86
2 manholes 10′–12′ deep, at $63.36	126.72
1 manhole 18′–20′ deep	105.60
462.9 lin. ft. 36″ brick sewer, 80,081.7 brick, at $23 per M	1,841.88
2,009.39 cub. yds. excavation, at 40c	803.75
Additional for 955.57 cub. yds. excavation over 16 ft. deep, at 37c	353.56
9 yds. hauled, at 1¼c	19.63
9 yds. hauled, at ½c	7.85
	4,134.94

XV.

Said Barnes also, in pursuance of his several contracts with the defendants and the several extensions thereof, dressed and joined old curb to amount in value, at regular prices, of $2,643.48, as stated in the first paragraph of his amended petition filed and allowed April 14, 1887. Conceded by defendant.

XVI.

The claimant has received payments on account of the work herein elsewhere mentioned aggregating	$178,949.57
And materials of the value of	22,748.11
Also sand of the value conceded	350.00
	202,047.68

XVII.

COUNTERCLAIM.

1. Under said contract 413, for work done after January 1, 1873, but prior to the extra work performed under the verbal agreement between the claimant and the Commissioners of said District as set forth in finding 13, on that part of Second street between Pennsylvania and Maryland avenues included in the original written contract, but not in any extensions thereof, partial measurements were made by the engineer and certified to the auditor, and in the certificate were the following quoted items, among others:

"5,539 cubic yds. grading, 30 cts. per yard;

"9,886 cubic yds. excavation hauled 2,300 feet over 200 ft., at 1 ct. per yard per 200 feet over 200 feet,"

which was the written contract rate.

Partial payment was made by the board of public works in accordance therewith September, 1873.

On final measurement the board of audit restated the whole account March 19, 1875; allowed 40 cents a yard for said grading, which exceeded the amount at written contract rates by $553, and allowed 1¼ 43 cents per yard for said haul per 100 feet over 200 feet, which exceeded the amount at written contract rates by $1,705.33, and payment was made accordingly.

2. Under said contract 413, said Barnes, after January 1, 1873, but before the verbal agreement between him and the Commissioners for the extra work set forth in said finding 13, did other work on Second street, between Pennsylvania and Virginia avenues, included in said original con-

tract and not in any extension thereof. In the certificate of final measurement, made January 9, 1874, the following, among others, appeared:

"8,400 cubic yds. grading, 40 cts., which in amount exceeded that at written contract rates in the sum of $840;

"19,566 cubic yds. excavation hauled 2,400 feet over 200 ft., 1¼ cts. per yard per 100 ft. over 200 ft.;"

which in amount exceeded that at written contract rates by the sum of $3,521.88, and partial payments were made by the board of public works.

Subsequently, March 19, 1875, the board of audit, after deducting the partial payments referred to, made final payment of the balance, in accordance with said statement.

3. Under said contract 413, said Barnes, after January 1, 1873, and prior to the verbal agreement between him and the Commissioners, set forth in said finding 13, did other work on Third street, between Pennsylvania and Maryland avenues, included in the original contract, but not in any extension thereof. Final measurement and certificates were made and paid October 8, 1873, by the board of public works, in which the following quoted items appear, among others:

"7,010 cubic yds. grading, 40 cts. per yard,"

which in amount exceeded that at written contract rates by the sum of $701;

"15,141 cubic yds. excavation hauled 2,400 cubic yards, 1¼ cts. per yard per 100 ft. over 200 ft.,"

which in amount exceeded that at original written contract rates by the sum of $2,725.38.

4. Under said original contract 413, said Barnes, after January 1, 1873, and before the verbal agreement for the extra work between him and the Commissioners, as set forth in said finding 13, did other work on Fourth street east, between Pennsylvania and Maryland avenues, included in the original written contract and not in any extension thereof. Final remeasurement was made and certified October 10, 1873, and the full amount paid in accordance therewith by the board of public works November 12, 1873, in which the following items appear:

"7,000 cubic yds. grading, 40 cts. per yard,"

which in amount exceeded that at written contract rates by the sum of $700;

"10,192 cubic yds. hauled 3,000 feet over 200 feet, 1¼ cents per yard per 100 ft. over 200 ft.,"

which in amount exceeded that at written contract rates by the sum of $2,293.20.

44

XVIII.

ASSIGNMENTS.

November 17, 1877, said Barnes assigned to Samuel J. Ritchie $6,000 of what might be due from the District to said Barnes, and June 28, 1878, he assigned the further sum of $5,000, and January 16, 1879, the further sum of $1,000, aggregating $12,000, as conceded by the parties without controversy.

CONCLUSIONS OF LAW.

Upon the foregoing findings of fact the court decide as conclusions of law:

1. That contract 264 be and the same is hereby re-formed so as to incorporate therein the rate of 40 cents per cubic yard for old gravel streets to a depth of 2 feet, to conform to the intention of the parties as set forth in finding 2.

2. That by reason of the facts set forth in finding 10 the claimant is not entitled to a re-formation of contract 413 in respect to said rate for old gravel streets.

3. That the claimant is entitled to be allowed on findings 9, 12, 13, 14, and 15 the sum of $238,781.94, less the sum of $202,047.68 heretofore paid said claimant, leaving a balance in his favor of $36,734.26.

4. The defendants must be allowed for the overpayments above those agreed upon in the written contracts as stated in finding 17 the sum of $13,039.79.

5. On the whole case, after deducting the one from the other sum, the claimant is entitled to judgment against the defendants for the difference, being $23,694.47, due and payable March 1, 1876, of which sum there shall be paid to said Samuel J. Ritchie, assignee as aforesaid, as agreed by said claimant, and which is hereby ordered, the sum of $12,000.

XIII.—*Opinion of the court.*

PEELLE, J., delivered the opinion of the court:

This action is founded upon the act June 22, 1880 (1 Supp. Rev. Stat., 562), known as the District of Columbia claims act, and grows out of two written contracts, Nos. 264 and 413, entered into by the claimant with the board of public works of said District April 29 and July 23, 1872, as authorized by the act of February 21, 1871 (16 Stat. L., 427), and also upon verbal agreements entered into in 1874 and thereafter with the Commissioners of said District.

Prior to the execution of the contracts, to wit, September 26, 1871, the board of public works, by entry or memoranda on their records, had fixed the price of grading for old gravel streets to a depth of 2 feet below the surface at 40 cents per cubic yard; January 22, 1872, 30 cents per cubic yard for grading, including the hauling of the excavated material not to exceed 200 feet, and for each additional 200 feet 1 cent additional per cubic yard beyond the first 200 feet.

And after the execution of said contracts, to wit, July 15, 1873, said board of public works, by like entry, fixed the price of hauling excavated material at 1¼ cents per cubic yard for every 100 feet hauled over the first 200 feet since June 1, 1873; and thereafter, by like entry September 27, 1873, the board made said rate applicable to "all work done since January 1, 1873."

45 Contract 264 was awarded to claimant by the board, as set forth in their records, at the rates so established, of which the claimant was notified; but by mistake in drafting the contract the rate of 40 cents for grading old graveled streets to a depth of 2 feet below the surface was omitted therefrom, and the board of public works and the claim-

ant, by mutual mistake, executed the contract without observing said omission.

Though the rate of 40 cents for old graveled streets was fixed prior to the date of the execution of contract 413, and though the clerk of the board notified claimant that said contract had been awarded to him at board rates, no entry was made by the board on their records to that effect, and as no mutual mistake is otherwise shown in that respect the claimant is not entitled to a re-formation of contract 413.

But as to contract 264, wherein the records of the board show that the same was awarded at board rates, and by mutual mistake the rate of 40 cents for old graveled streets was omitted therefrom, the claimant is entitled in that respect to a re-formation of his contract, and the same is decreed accordingly.

By the terms of the contracts aforesaid the claimant agreed to furnish at his own cost and expense all the necessary materials and labor, and, among other things, to grade the streets therein named, including North Carolina avenue, as stated in contract 264, at the price of 30 cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding 200 feet, and 1 cent additional per cubic yard for every 200 feet hauled beyond that distance, and 40 cents per cubic yard for old graveled streets to a depth of 2 feet, as provided by said contract 264 so re-formed.

Although the rates thus fixed by the board, at 40 cents per cubic yard for old graveled streets and 1¼ cents per cubic yard for every 100 feet hauled over 200 feet, were not made a part of contract 413, the claimant was paid said rates for the work done thereunder as set forth in the counterclaim, and for the difference between the rates so paid and those specified in the original written contract the defendants interposed their counterclaim.

In the former trial of the case the controversy was as to the quantity and classification of the excavated material on North Carolina avenue, and as to whether the prices specified in the written contract should control. On the issues thus joined the case was tried and findings of fact and conclusions of law thereon were filed, together with an opinion by the late Chief Justice Richardson, which resulted in a judgment on the counterclaim in favor of the District of Columbia for $11,264.58. (22 C. Cls. R., 366.)

On the question as to whether the court can "enforce claims founded upon these memoranda of the board of public works," and whether the board can legally pay the rate so fixed, the court said: "In the numerous cases which have been before us under the District claims act we have uniformly and unanimously held otherwise." The numerous authorities in support of that statement are cited.

It was further said in the opinion: "When a statute provides how contracts by public officers shall be made, an entire or material departure from such requirements, though sufficient at common law to bind the parties, renders the proceedings void and of no effect as obligations on either side. It has been so decided by the Supreme Court in the
46 South Boston Iron Company case (118 U. S., 37), affirming the judgment of this court (18 C. Cls. R., 165). In that case the statute passed upon by the court is in language much less mandatory than the one we are now considering, and there were offers and acceptances

n writing, signed separately by the parties, but the court held that they did not constitute a contract within the terms of the statute."

In the findings filed at that time only 63,816 cubic yards of grading was found to have been done on North Carolina avenue, although the four separate measurements made by the engineer officers of the District of the excavation therein as set forth in items 13, 15, 18, and 20 show that the claimant excavated 97,366 cubic yards, of which 64,573 cubic yards, as shown in Finding VII, were excavated under the verbal agreement with the Commissioners of the District that the claimant should be paid the board rates therefor; and the agreement thus made was after the claimant had performed his original contract, 264, in excavating about 32,793 cubic yards to bring North Carolina avenue to its then established grade.

At the former hearing the claimant was denied the rate of 60 cents per cubic yard for the excavation of stiff clay on North Carolina avenue on the ground, as stated in the opinion of the court, that "the stiff clay, which is one kind of earth, rendered the grading in some places, no doubt, more difficult than it would have been had the earth been of a lighter material, but by the sixth article of contract 264 it was agreed, among other things, that all loss arising out of the nature of the work to be done, or from any unforeseen obstructions, or difficulties encountered in the prosecution of the same, should be sustained by the contractor."

That ruling was based on the finding then made that the stiff clay excavation was done at the written contract rate of 30 cents per cubic yard, the contractor agreeing to sustain any unforeseen obstructions or difficulties encountered in the prosecution of the work; but as the excavation of the stiff clay was done under the verbal agreement with the Commissioners in 1874, long after the claimant had performed his original contract, 264, he is entitled to the rate therefor then established and paid to other contractors for like work, as set forth in Finding VIII, which rate we find was reasonable and allow, as set forth in item 26, Finding IX.

We have also added to the former finding of work done on North Carolina avenue the excavation under the sidewalks and carriageway, including the haul of the excavated material, at 1¼ cents for every 100 feet hauled, as set forth in item 27, Finding IX.

In respect to work done on D street, the original contract 264 required the excavation of about 4,267 cubic yards to bring that street to the then established grade, which work was completed in August, 1872, as set forth in Finding III.

Nearly two years later, and after the Commissioners had established the new grade for North Carolina avenue, as aforesaid, it became necessary to further grade D street to bring it to the new grade, and the claimant with like verbal agreement with the Commissioners performed said additional work, for which he was only allowed the rate of 1 cent per cubic yard for every 200 feet of haul, and he now claims under said verbal agreement with the Commissioners the board rate of 1¼ cents per cubic yard for every 100 feet of haul, which we allow, as set forth in item 5, Finding IX.

And in addition thereto the claimant is entitled, under the re-for-
47 mation of his contract, to the rate of 40 cents per cubic yard for the old gravel excavated in said street, as set forth in item 2, Finding IX.

In regard to the work performed on Third street, the original contract 413 required, to bring said street to its then established grade, the excavation of about 7,078 cubic yards, as set forth in Finding XIII, though some additional grading was done thereon under the written extensions of said contract at board rates, as therein provided for, which were allowed.

The change of the grade of North Carolina avenue also necessitated additional excavation in Third street to bring it to the new grade so established by the Commissioners in 1874, and under the direction of said Commissioners, and with the like verbal agreement as set forth in Finding XIII, the claimant further excavated Third street, taking therefrom 22,248.83 cubic yards, for which he was, in the former findings, allowed but 1 cent per cubic yard for the haul of 200 feet, instead of the board rate of 1¼ cents per cubic yard agreed to be paid, and which he is now allowed, as stated in item 24 in said Finding XIII.

As we have denied the claimant's prayer to re-form contract 413 in respect to the rate of 40 cents for old graveled streets, for the reason set forth above, the claimant is allowed only the written contract rate of 30 cents therefor, except where the written extension of said contract provided for board rates, in which case they are allowed as indicated in the several findings.

We have thus stated the differences between the findings heretofore filed and the findings now filed.

On the former trial the court proceeded upon the theory that all the work done was under the written contracts and the written extensions thereof, and upon that theory the law of the case is correctly stated in the opinion of the court, for the reason that both contracts were entered into by the claimant with the board of public works under the act of February 21, 1871, section 37 (16 Stat. L., 427), providing, among other things, that "all contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District; and said board of public works shall have no power to make contracts to bind said District for the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

As that act required all contracts made by the board to be in writing, "signed by the parties making the same," it follows that the board had no power to authorize work to be done at prices fixed by them which were merely entered on the records of their office.

Where such prices were agreed to be paid, the act required that the contract embodying the same be reduced to writing and signed by the parties, and in several extensions of the contracts that course was pursued, as shown in Findings VI and XI.

Under that act, as rightly construed by the court, "the board of public works was a body of limited jurisdiction, with their method of making contracts expressly defined, and the contracts themselves limited to appropriations made by law."

Hence the entry in the journal or other record of the board fixing rates could not affect the rates fixed in a written contract.

Such was the ruling by the Supreme Court in the case of Barnard v. District of Columbia (127 U. S., 409, 411), wherein it was
48 said, "the entry in the journal of the board was no part of the

contract with the claimant, nor could it in any respect control the construction or limit the effect of such contract. The board could not in that way either make a new contract or alter the one previously made so as to bind the District."

And in the case of Eslin (29 C. Cls. R., 370, 393), in respect to the same question the court said: "This question has been so fully discussed in the recent opinion of the chief justice, in the case of Barnes v. District of Columbia (22 C. Cls. R., p. 366), that it is unnecessary to go over the ground again. We hold in these cases, as we held there, that these orders of the board of public works do not change the written contracts between the parties made before the orders were issued, and much less contracts made thereafter.

The plaintiff coming into court for a final settlement with the District, and having received public money to which he had no legal claim, must be held liable to refund it.

And so in that case it was held that the District could recover back the overpayment as was held in the present case, to which ruling the court adheres in respect of the counterclaim, for the reason that the overpayments upon which the counterclaim is based were payments in excess of the rates fixed by the written contract under which the work was done.

But, as we now find that the additional work of excavation and consequent hauling were done by the claimant under the verbal agreement with the Commissioners of the District and the work accepted as set forth in the findings, the question is, Had the Commissioners the authority so to contract in respect thereto?

By the provisions of the act of June 20, 1874, section 1 (Stat. L., 116), it was provided, "that all provisions of law providing for an executive, for a secretary for the District, for a legislative assembly, for a board of public works, and for a delegate in Congress in the District of Columbia are hereby repealed," except as to the term of office of the delegate then in Congress.

By section 2 of said act it was provided, "That the President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint a commission, consisting of three persons, who shall, until otherwise provided by law, exercise all the power and authority now lawfully vested in the governor or board of public works of said District, except as hereinafter limited; who shall be subject to all restrictions and limitations now imposed by law on said governor or board * * * but said commission, in the exercise of such power or authority, shall make no contract, nor incur any obligation other than such contracts and obligations as may be necessary to the faithful administration of the valid laws enacted for the government of said District, to the execution of existing legal obligations and contracts, and to the protection or preservation of improvements existing, or commenced and not completed, at the time of the passage of this act." * * *

Under the provisions of that act it would seem that the Commissioners of the District were limited in the exercise of their authority to the restrictions and limitations imposed by law on the governor and the board of public works, and they were thereby prohibited in the exercise of their power from making contracts or incurring any obligation otherwise than as there stated.

49 However, by the act of June 16, 1880 (21 Stat. L., 284), being the act providing for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear and determine the same, and for other purposes, it was, among other things, provided by section 1, "That the jurisdiction of the Court of Claims is hereby extended to, and it shall have original legal and equitable jurisdiction of—

"All claims now existing against the District of Columbia arising out of contracts made by the late board of public works and extension thereof made by the Commissioners of the District of Columbia;

"And such claims as have arisen out of contracts made by the District Commissioners since the passage of the act of June twentieth, eighteen hundred and seventy-four;

"And of all claims for work done by the order or direction of the said Commissioners and accepted by them for the use, purposes, or benefit of the said District of Columbia, and prior to the fourteenth day of March, eighteen hundred and seventy-six."

It will thus be observed that three classes of claims are recognized by the act conferring jurisdiction upon the court.

(1) All claims against the District arising out of contracts made by the board of public works and extensions thereof made by the Commissioners of the District;

(2) All claims arising out of contracts made by the Commissioners since the passage of the act of June 20, 1874, and

(3) All claims for work done by the order or direction of the said Commissioners and accepted by them for the use, purposes, or benefit of the District prior to March 14, 1876.

It will thus be seen that the Congress recognized claims for work done "by the order or direction of the said Commissioners," where the work had been accepted by them for the use and benefit of said District prior to March 14, 1876.

And this view of the law is in harmony with the decision in the case of Campbell and Eslin v. The District of Columbia (18 C. Cls. R., 193), wherein it was held, in substance, that where contracts were made and work completed under them a subsequent order of the board of public works, establishing for such work higher prices, would not apply to work done under such preexisting contracts.

But where there was a revival of the contracts after the work under them had substantially been completed and such revived contracts apply to distinct work, subsequent to the raising of the rates for like work, a contractor was held to be entitled to the benefit of the increased rate for such subsequent work. (See authorities there cited.)

In the present case there does not appear to have been, in terms, a revival of the written contracts, but the verbal agreements on the part of the Commissioners of the District were that for the new or additional work done by the claimant he should be paid the rates therefor established and paid by the board of public works, so that whether the work be regarded as having been done under the contracts as revived or under the verbal agreement of the Commissioners, as set forth in findings, the claimant, in either event, is entitled, under the provisions of the act of 1880, to the benefit of the rates so established and promised to be paid for the new or additional work performed by him.

Therefore the claimant is entitled to recover on the whole case, after deducting the amount heretofore paid him from the amount shown by the findings to be due, less the counterclaim in favor of the defendants for $13,039.79, the sum of $23,694.47, for which latter amount judgment will be entered, and of which judgment there shall be paid to Samuel J. Ritchie, assignee, as agreed by said claimant and which is hereby ordered, the sum of twelve thousand dollars ($12,000).

The judgment herein rendered against the District of Columbia is due and payable March 1, 1876, within the meaning of the provisions of section 6 of the act of June 16, 1880, chapter 243.

50 XIV.—*Judgment of the court entered March 31, 1902.*

ELIAS E. BARNES
vs.
THE DISTRICT OF COLUMBIA.

At a Court of Claims held in the City of Washington on the 31st day of March, 1902, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said Elias E. Barnes do have and recover, in the manner provided by the act of June 16, 1880, chapter two hundred and fifty-three, the sum of twenty-three thousand six hundred and ninety-four $\frac{47}{100}$ dollars ($23,694.47) upon debts of the District of Columbia, due and payable March 1, 1876, within the meaning of the sixth section of the said act; twelve thousand dollars ($12,000) of said sum are to be paid to Samuel J. Ritchie, assignee of said Barnes.

BY THE COURT.

51 XV.—*Defendant's application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 31st day of March, 1902, in favor of the claimant, the defendant, by its Attorney-General, on the 22nd day of April, 1902, makes application for and gives notice of an appeal to the Supreme Court of the United States.

L. A. PRADT,
Asst. Attorney-General.
ROBERT A. HOWARD,
Special Assistant Attorney.

Filed April 22, 1902.
Allowed June 26, 1902, in open court.

LAWRENCE WELDON,
Presiding Judge.

52 XVI.—*Mandate of Supreme Court of the United States dismissing the appeal for want jurisdiction. Filed in the Court of Claims, January 12, 1903.*

A mandate of the Supreme Court of the United States, dated January 8, 1903, in the above-entitled cause, was filed in the Court of Claims January 12, 1903, in which it is ordered that—

"Whereas, in the present term of October, in the year of our Lord

one thousand nine hundred and two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and on a motion to dismiss, which was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that this appeal be, and the same is hereby, dismissed for the want of jurisdiction. December 8, 1902."

53 *Motion of defendant for appeal. Filed May 11, 1903, under the act of March 3, 1903.*

ELIAS E. BARNES
v.
THE DISTRICT OF COLUMBIA. } No. 47, D. C.

Motion for allowance of appeal, provided for by the act of March 3, 1903.

Petitioner states that from the judgment rendered in this case on March 31st, 1902, an appeal was allowed by this court to the Supreme Court; that on filing the transcript in the Supreme Court the claimant interposed a motion to dismiss the appeal for want of jurisdiction in the court to entertain the same. This motion was based upon the following provision of law embraced in the act of June 6, 1900 (c. 789, 31 St. L., 572):

"Defending suits in claims: For defending suits in the United States Court of Claims, two thousand dollars: Provided, that no judgment heretofore or hereafter rendered under the act of June sixteenth, eighteen hundred and eighty, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by Congress."

This motion was allowed and the appeal dismissed. Subsequently the following provision was enacted in "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, nineteen hundred and three, and for prior years, and for other purposes." (c. 1006, St. 2d sess. 57th Cong., 1031, 1070):

"For the payment of the judgments, except the judgment in favor of Elias E. Barnes, rendered by the Court of Claims, reported to Congress at its present session in House Document Numbered Three hundred and sixty and Senate Documents Numbered One hundred and eighty-seven and two hundred, two hundred and ninety thousand three hundred and fifty-four dollars and forty-nine cents: Provided, that none of
54 the judgments herein provided for shall be paid until the right of appeal shall have expired: And provided further, that the proviso contained in the act approved the sixth day of June, anno Domini nineteen hundred, entitled 'An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes,' which reads as follows: Provided, that no judgment heretofore or hereafter rendered under the act of June sixteenth, eighteen hundred and eighty, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction

on the Court of Claims to hear the same, and for other purposes,' shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by, Congress, be, and the same is hereby, repealed; and from all final judgments or decrees heretofore rendered in suits of the character of those mentioned in said proviso an appeal shall be allowed to the Supreme Court of the United States at any time within ninety days after the passage of this act, except in cases where the amounts found due by said court have been paid at the Treasury."

And your petitioner states that this judgment in favor of Elias E. Barnes is the judgment hereinbefore recited, and that the same has not been paid at the Treasury.

Wherefore comes petitioner, on this 11th day of May, 1903, a day within ninety days after the passage of the aforementioned act of March 3, 1903, and prays this honorable court that the allowance of an appeal from the judgment rendered herein on March 31, 1902, be granted to the defendant.

L. A. PRADT,
Assistant Attorney-General.

ROBERT A. HOWARD,
U. S. Special Attorney.

Filed May 11, 1903, and ordered to the law calendar.

OCTOBER 26, 1903.

Ordered that the appeal be allowed as prepared for.

BY THE COURT.

55 Court of Claims.

ELIAS E. BARNES
vs.
THE DISTRICT OF COLUMBIA. } No. 47.

I, John Randolph, assistant clerk Court of Claims, hereby certify that the foregoing are true transcripts of record, in the above-entitled cause, of the findings of fact and conclusions of law and opinion filed by the court, March 31, 1902; of the final judgment of the court entered March 31, 1902; of the application of the defendant for an appeal to the Supreme Court of the United States, filed April 22, 1902, and the allowance of same; of the mandate of said Supreme court, dated January 8, 1903, dismissing said appeal for want of jurisdiction; of the motion of defendant, filed May 11, 1903, for granting an appeal to said Supreme Court, as provided by act of Congress of March 3, 1903, and of the allowance of said appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 19th day of November, 1903.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 19,135, Court of Claims. Term No. 143. The District of Columbia, appellant, vs. Elias E. Barnes. Filed November 21st, 1903. File No. 19,135.

O

EXTRACTS FROM TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 143.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ELIAS B. BARNES.

APPEAL FROM THE COURT OF CLAIMS.

RECORD FILED NOVEMBER 21, 1902.

(19,135.)

(19,135.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 484.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ELIAS E. BARNES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 4, 1904.

(Record, page 1.)

Court of Claims.

ELIAS E. BARNES
vs.
THE DISTRICT OF COLUMBIA. } No. 47, D. C.

I.—*Original Petition.*

Filed August 4, 1880.

To the honorable the judges of the Court of Claims:

The petition of Elias E. Barnes respectfully represents:

1. That he is a citizen of the United States and a resident of the District of Columbia.

2. That subsequent to February 21, 1871, and prior to December 1, 1875, under contracts with the Board of Public Works and with the Commissioners of said District of Columbia, he had done and performed a large amount of work in the improvement of North Carolina avenue between New Jersey avenue and Fourth street southeast, as appears by the measurements on file in said District, together with extra work done under orders of the District authorities, and that upon a just settlements of his said accounts and for material furnished, there was due him on said February 1, 1876, a balance of thirty-six thousand nine hundred and eighty-seven and 11/100 dollars.

3. That upon a just settlement of his accounts for the improvement of D street southeast between New Jersey avenue and Sixth street, there was due him on said December 1, 1875, a balance of fifteen hundred and twenty-four 63/100 dollars, for work done and materials furnished under contracts with said Board of Public Works and the Commissioners of said District.

4. That there was also due him at said date for work done and materials furnished in the improvement of Third street southeast from D street to the river under contracts as aforesaid, the further sum of eight thousand two hundred and twelve 36/100 dollars as the balance of his account on said street.

5. That upon settlement of his account for the improvement of E street southeast between First and Sixth streets, under contracts as aforesaid, there was at said date due him the further sum of one hundred and 69/100 dollars.

6. That upon settlement of his accounts for the improvement of C street southeast between South Capitol and Third streets, under contracts as aforesaid, there was due him at said date a balance of twenty-two hundred and eighty and 2/100 dollars.

7. That upon settlement of his accounts for the improvement of M street south between Fourth street east and Four-and-a-half street west, under contracts as aforesaid, there was due him at said date the further sum of eleven thousand six hundred nine and 14/100 dollars.

8. That for taking up and removing brick pavements, curb, gutters and other old material under orders from the said Board of Public Works prior to August 1st, 1874, there is justly due him the sum of five thousand four hundred twenty-six and 74/100 dollars.

9. That upon settlement of his account for work done on Second street southeast, made in January 1876, there was retained a percentage of one hundred seventy-one and 69/100 dollars which is still due and unpaid.

10. That upon settlement of his accounts for putting down a pipe and brick sewer on I street southeast between Second and Third streets, there was withheld from him a percentage amounting to forty-nine and 29/100 dollars for work done prior to January 1, 1875, as per board of audit voucher No. 14129.

And petitioner avers that said several sums amounting in the whole to sixty-six thousand three hundred sixty-one and 67/100 dollars are still due and unpaid, and he prays judgment therefor against the said District of Columbia.

E. E. BARNES.

Elias E. Barnes, the petitioner aforesaid, says that the facts stated in the foregoing petition are true, that he is justly entitled to the amount therein claimed after allowing all just credits and offsets. That no assignment or transfer of said claim *as* any part thereof or interest therein has been made other than two powers of attorney to one S. J. Ritchie to collect two small sums, one of six thousand dollars and one of five thousand dollars, both of which said power- of attorney have been revoked by written instrument, duly executed and filed with notice; and one unrevoked power of attorney to said Ritchie to collect one thousand dollars on account.

Sworn to and subscribed this 3d day of August A. D., 1880, before me—

CHARLES WALTER,
United States Comm'r.

Claimant's address, Washington, D. C.

SAM M. WILCOX,
Att'y for Claimant, Washington, D. C.

(Record, page 2.)

II.—*General Traverse.*

Filed December 10, 1880.

And now comes the Attorney General, on behalf of the District of Columbia, and answering the petition of the claimand herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Assistant Attorney General.

(Record, page 3.)

IV.—*Plea of Set Off.*

Filed January 26, 1882.

ELIAS E. BARNES
vs.
THE DISTRICT OF COLUMBIA. } No. 47.

And now comes the Attorney-General on behalf of the District of Columbia, and for a further plea says:

That at and before the institution of this suit, the claimant was and still is indebted unto the District of Columbia in the full and just sum of $25,000 for money had and received to the use of the defendant, and the said claimant being so indebted as aforesaid, in consideration thereof promised to pay the defendants the said sum of money on request; yet the said claimant, although often requested so to do, hath not, nor hath any one in his behalf, as yet paid the same sum or any part thereof, but hath wholly neglected and refused, and still neglects and refuses, so to do; which said sum so due as aforesaid the defendant claims to set off against the demand of the claimant, and thereupon he brings his counter claim.

THOMAS SIMONS,
Assistant Attorney-General.

(Record, page 3.)

V.—*Replication.*

Filed February 10, 1882.

Now comes the claimant by H. E. Paine, his attorney, and for replication to the plea of set off herein filed on the 26th day of Janu-

ary, 1882, says that by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said defendant, because he says that he is not indebted to the said defendant in the sum of $25,000, as in said plea alleged, or in any other sum, and that he has not, at any time, promised to pay said sum or any part thereof to said defendant; wherefore he prays judgment for the sum of $66,174.36 as demanded in his petition herein filed.

ELIAS E. BARNES,
By H. E. PAINE, *Att'y.*

DISTRICT OF COLUMBIA, *ss:*

Elias E. Barnes, having been duly sworn, says that he is the claimant named in the foregoing replication, and that said replication is true.

Subscribed and sworn to before me, Elias E. Barnes, this 10th day of February, 1882.

RUTLEDGE WILLSON,
Notary Public.

(Record, page 29.)

XII.—*Findings of Fact and Conclusions of Law Filed by the Court.*

March 31, 1902.

ELIAS E. BARNES
v.
DISTRICT OF COLUMBIA.

This case having been heard before the Court of Claims, the court, upon the evidence, makes the following findings of fact.

I.

Prior to April 29, 1872, the Board of Public Works of the District of Columbia had, by order entered on their records, fixed the price of certain work to be done in the improvement of streets in the city of Washington, among which were the following:

"For grading from and after January 22, 1872, 30 cents per cubic yard, including the hauling of the earth excavated, not to exceed 200 feet; and for each 200 feet hauled beyond the first 200 feet 1 cent additional per cubic yard.

"For grading old graveled streets to a depth of 2 feet, 40 cents per cubic yard."

And on said April 29, 1872, the said board, as shown by their records, awarded to the claimant herein at the rate, so fixed, among others, a contract of which the claimant was notified in writing

about which there is no controversy, and the contract clerk of said board was directed to prepare the contract accordingly.

The said clerk prepared a contract designated as contract No. 264, which was executed by the parties in these words:

"*Contract No.* 264.

"This contract, made and concluded this 29th day of April, in the year one thousand eight hundred and seventy-two, by the Board of Public Works of the District of Columbia of the first part and Elias E. Barnes, of Washington, D. C., of the second part, witnesseth:

"First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed—

"To furnish at his own proper cost and expense all the necessary materials and labor, and in a good, firm, and substantial manner to grade D street south, from Fourth street east to New Jersey avenue, in the city of Washington, D. C.; also to grade North Carolina avenue from Fourth street east to New Jersey avenue, in the city of Washington, D. C.

"Also to construct, with the necessary manholes, an eighteen (18) inch pipe sewer from Providence hospital, at the corner of said D and Second streets S. E., through the Government reservation at the intersection of D street S. E. and North Carolina avenue, to the main sewer on said D street S. E.; also, so soon as the connections of said sewer, as above, are made and completed, to take up and remove the old brick sewer now down and through said Government reservation, the work of said grading and sewering to be executed, in every respect, in conformity with the specifications following, to-wit:

* * * * * * *

"Second. It is further agreed that the said party of the first part shall appoint, from time to time, such person or persons as may be by said party deemed proper, to inspect the material to be furnished and the work to be done under this contract, and that such person or persons shall have any and all opportunity and privileges which may be necessary to enable them to faithfully make the inspection aforesaid.

"Third. It is further agreed that the work under this contract shall be commenced on or before the fourth day of May, one thousand eight hundred and seventy-two.

"Fourth. It is further agreed that the said party of the first part may, on notice to the party of the second part, suspend work under this contract; but if not suspended, it shall be completed within ninety days from the date fixed for its commencement, and that the

said work shall not be sublet without the consent in writing of the said party of the first part. And any subletting or assignment without such consent shall work a forfeiture of this contract.

* * * * * * *

"Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unfor-seen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor.

* * * * * * *

"Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of the Board of Public Works aforesaid, and that whenever the said chief engineer aforesaid shall certify, in writing, that the party of the second part completely performed this contract on his part, and shall submit, with said certificate, his estimate of the amount due the party of the second part, then, within thirty days, as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made, as hereinafter mentioned.

"And it is further expressly agreed that no money shall become due and payable under this contract except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him, excepting such sum or sums as may be retained under any provision of this contract; provided that partial payments may be made, under direction of the board, otherwise than upon the estimates of the engineer, as provided above, if, in the opinion of the board, the vigorous prosecution of the work will be promoted thereby.

* * * * * * *

"Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

"Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two

hundred (200) feet, and one cent additional per cubic yard for every two hundred (200) feet beyond the above.

"Eighteen (18) inch pipe, per lin. ft., $1.62.

Manholes:

6 ft. deep or under	$31.68
Over 6 ft. deep and not more than 8 ft. deep	42.24
" 8 " " " " " " 10 " "	52.80
" 10 " " " " " " 12 " "	63.36
" 12 " "	73.92

"Excavation and refilling, forty (40) cents per cubic yard, to be measured in excavation only.

"Taking up and removing old brick sewer.

"Which said sums or prices the said party of the first part shall pay to the said party of the second part as herein provided.

"Eleventh. It is further agreed that the measurements shall be made by the engineer of the board or his assistants. * * *

"In witness whereof, &c. * * *"

II.

That by mistake in the drafting of said contract the rate of 40 cents for grading old gravel streets to a depth of 2 feet was omitted therefrom; that said Board of Public Works and said claimant, by mutual mistake, executed said contract without observing said omission.

III.

That under and pursuant to said contract the claimant excavated on North Carolina avenue, to bring said street to the then established grade, 32,739 cubic yards, and on D street—both in said city—about 4,267 cubic yards of excavation, which work was completed about August 22, 1872.

IV.

In September, 1873, the Board of Public Works increased the price for hauling earth from 1 cent per cubic yard for 200 feet, to 1¼ cents per cubic yard for 100 feet of hauling beyond the first 200 feet, and made said rate applicable to all work done after January 1, 1873.

V.

Thereafter, in 1874, the Commissioners of the District of Columbia established a new grade for North Carolina avenue and directed the claimant to further excavate said street, in order to conform the same to the newly established grade, with the understanding and agreement, verbally made, that the claimant should be paid therefor, the then existing board rates in certificates, convertible into

bonds of the District of Columbia bearing interest at the rate of 3.65 per cent.

VI.

That subsequent to the execution of said contract No. 264, set forth in the first finding herein, said claimant entered into other contracts with the Board of Public Works and the Commissioners of said District, the first of which was effected by said board and the residue by the Commissioners, designated as extensions of said contract No. 264, in these words:

"*First Extension of Contract No.* 264.

"By and between Board of Public Works and said Barnes.

"It is hereby agreed that this contract, with its various terms, conditions, and stipulations (except as respects the time of execution), shall be extended so as to embrace the setting of curbstones and the laying and putting down of brick foot pavements on North Carolina avenue, between New Jersey avenue and Fourth street S. E., in the city of Washington D. C.

"Also the setting the curbstones and the laying and putting down of the brick foot pavements on D street S. E., between New Jersey avenue and Fourth street S. E., in the city of Washington D. C.

"Also the gravelling of said D street S. E., between Sixth and Seventh streets S. E., in the city of Washington, D. C.

"Also the gravelling of the carriageway of North Carolina avenue from Pennsylvania avenue to New Jersey avenue, in the city of Washington, D. C.

"Also the grading, the setting of curbstones, and the laying and putting down of the brick foot pavements on D street S. E. from Fourth to Sixth street- S. E., and the terracing of said D street S. E. from Second to Fourth street- S. E., in the city of Washington, D. C.

"Also the grading of E street S. E. from Second to Sixth streets S. E., in the city of Washington, D. C.

"The said work to be paid for at board rates for said work, and to be begun and completed immediately, and said work to be executed in every respect in conformity with the accompanying specifications.

"Witness our hands and seals the twenty-first day of May, A. D. 1873."

"*Second Extension of Contract No.* 264.

"For and in consideration of the stipulations hereinafter contained it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 264 in the series of contracts made by the Board of Public Works of the Dis-

trict of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, viz:

"Grade M street south, between 3d street east and James Creek canal.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the Board of Public Works for work of similar character, provided that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

"It is further agreed that the work herein specified shall be completed by the first day of November, 1875, under penalty of forfeiture of all right and title to perform the same.

"In witness whereof the Commissioners of the District of Columbia, successors to the Board of Public Works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purposes,' approved June 20, 1874, and the party of the second part to these presents have hereunto set their hands and seals this 19th day of June, 1875."

"*Third Extension of Contract No.* 264.

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 264 in a series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit:

"Replace all suitable old material on E street south, between 2d and 6th streets east.

"It is further agreed that the work herein specified shall be completed by the 30th day of December, 1875, under penalty of forfeiture of all right and title to perform the same.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the Board of Public Works for work of similar character; provided, that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

"In witness whereof the Commissioners of the District of Columbia, successors of the late Board of Public Works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purposes,' approved June 20, 1874, and the party of the second part to these presents has hereunto set his hand and seal this 21st day of December, 1875."

VII.

That after the change of grade of North Carolina avenue as aforesaid, the claimant excavated 64,573.6 cubic yards, measured by the engineer officers of said District March and December, 1875, and January, 1876, for which excavation, according to the verbal agreement with the Commissioners aforesaid, the claiment was to receive the rate so established and paid by the Board of Public Works, including 1¼ cents per cubic yard for every 100 feet of excavation hauled beyond the first 200 feet, which was to be paid in bonds of the District of Columbia as aforesaid.

VIII.

That subsequent to the execution of said contract No. 264, and before the Commissioners of said District had directed the claimant to proceed to a further excavation of North Carolina avenue to bring it to the new grade so established by said Commissioners, the Board of Public Works had established by payment to several contractors, *i. e.*, four or five, for like work, the rate of 60 cents per cubic yard for stiff clay excavation, which the court finds was a reasonable price therefor.

IX.

That under said contract No. 264 and the extensions thereof, and as re-formed by the insertion of the omitted rate for old gravel streets and the additional for clay excavation, and the extra work performed under the verbal agreement of the Commissioners of said District as aforesaid, which work was accepted by said Commissioners and the District received the benefit thereof, the claimant performed the following work:

North Carolina Avenue—Contract No. 264.

1.	2,318 lin. ft. 12-inch gutter flag laid, at 35c	$811.30
2.	533 lin. ft. 16-inch gutter flag laid, at 48c	255.84
3.	17.7 ft. 5-inch granite curb laid, at $2.05	36.28
4.	14.1 ft. 5-inch circular curb, Gleason pattern, at $2.05	28.90
5.	64 cubic yards sewer excavation, at 40c	25.60
6.	90 ft. 12-inch pipe laid, at 88c.	79.20
7.	1 trap	157.58
8.	3,972.34 square yards graveling, at 15c	595.85
9.	3,008.92 square yards brick pavement, at $1	3,008.92
10.	1,376 square yards cobble pavement, at 70c.	963.20
11.	1,210 ft. 16-inch flagging for crossings laid, at 60c	726.00
12.	1,889.3 ft. 5-inch new curb and setting, at $1.20	2,267.16
13.	32,793 cub. yards excavation, per meas. Aug. 9, 1872, at 30c. to established grade	9,837.90
14.	Haul on same, at ½c. per 100 ft., 1,100 ft., at 5½c	1,803.61

15. 20,438 cub. yards excavation, per meas. Mar. 27, 1875, at 30c., between Coyle grade and new grade..	6,131.40
16. 3,854 cub. yds. haul 300 ft., at 1¼c. per 100 ft., at 3¾c..	144.52
17. 16,584 cub. yds. haul 1,100 ft., at 13¾c., at 1¼c. per 100 ft.	2,280.30
18. 10,585.6 cub. yds. excavation, per meas. Dec. 2, 1875, at 30c. per cub. yd., between Coyle grade and new grade	3,175.68
19. Haul on 10,585.6 cub. yds., 1,550 ft., at .1937c., at 1¼c. per 100 ft.	2,050.43
20. 33,550 cub. yds. excavation, per meas. Jan 22, 1876, at 30c. per cub. yd., between Coyle grade and new grade	10,065.00
21. Haul on 33,550 cub. yds., 1,550 ft., at .1937c., at 1¼c. per 100 ft.	6,498.63
22. 775.5 lin. ft. 5-inch curb, at $1.20	930.60
23. 1,077.78 square yds. brick pavement, at $1.00	1,077.78
24. 2,160 square yards graveling, at 15c	324.00
25. 750 ft. blind drain, at $1.00	750.00
26. Additional stiff clay excavation, 23,704 cub. yds., at 30c. (done after 1874)	7,111.20
27. Excavation under sidewalks, viz., 10 inches depth under 4,086.70 sq. yds. brick pavement, 1,135.19 cub. yds., at 30c	340.55
2,044.11 cub. yds. excavation under carriageway, 12 inches depth, under 6,132.34 sq. yds. graveling, at 30c	613.23
Haul on above 3,179.30 cub. yds., 1,550 ft., at .1937c..	615.83
Total	62,706.49

The excavation, as well as the rate of 1¼ cents per haul therefor mentioned in items 15 to 21, both inclusive, and item 27 were for work done under the verbal agreement with the Commissioners of said District as aforesaid, as was also the additional or clay excavation mentioned in item 26. The excavation mentioned in item 27 is not included in either of the measurements mentioned in items 13, 15, 18 or 20.

D Street S. E.—Contract No. 264.

1. 4,667.11 sq. yds brick pavement laid at $1	$4,667.11
2. 5,219 cub. yds. excavation, at 40c., meas. of Dec. 14, 1876, between 2d and 6th Sts.	2,087.60
3. 19,471 cub. yds. excavation, at 30c. meas. of Dec. 4, 1876, between 2d and 6th Sts.	5,841.30
4. Haul of 2,238 cub. yds. excavation between original surface and established grade, 2,358 feet, at ½c. per 100 feet, .1179c	263.86

5. Haul of 20,752 cub. yds. excavation between established grade and new grade, 2,358 feet, at 1¼c. per 100 feet, .2947c., as per agreement with Commissioners	6,115.61
6. 1,345 sq. yds. sodding at 50c	672.50
7. 4,266.45 lin. ft. 5″ b. s. curb and setting at $1.20	5,119.74
8. 435 lin. ft. 6″ granite curb and setting, at $1.42	617.70
9. 41.4 lin. ft. granite cir. curb and setting, at $2.05	84.87
10. 932.4 sq. yds. cobblestone pavement, laid at 70c	652.68
11. 3,735.6 sq. yds. graveling, at 15c	560.34
12. — ft. g. granite corners, at $2.05	67.44
13. 1,133 lin. ft. 12″ sewer and laying at 88c	997.04
14. 274 lin. ft. 15″ sewer and laying, at $1.33	364.42
15. 819 lin. ft. 6″ sewer and laying, at 36c	294.84
16. 111 lin. ft. 12″ by 6″ connections, at $1.38	153.18
17. 30 lin. ft. 15″ by 6″ connections, at $1.80	54.00
18. 2 manholes 6′ to 8′ deep, at $42.24	84.48
19. 5 manholes 8′ to 10′ deep, at $52.80	264.00
20. 4 manholes 10′ to 12′ deep, at $63.36	253.44
21. 1 receiving basin, new pattern	157.58
22. 2 receiving basins	315.16
2 receiving basins, old pattern, reset, at $37.00	74.00
23. 1,450.50 cub. yds. excavation, at 40c., under extension	580.20
24. 90 lin. ft. 12″ sewer and laying, at 88c	79.20
25. 70.5 cub. yds. excavation, at 40c. under extension	28.20
26. 2,561 ft. 12″ gutter flag laid, at 35c	896.35
27. 456 ft. 16″ bridging, at 60c	273.60
	31,620.44

The total excavation, according to the final measurement, was ... 24,690 cub. yds.

On 1,700 cub. yds. no haul was allowed, presumably because it was hauled less than 200 feet..... 22,990—2,358 ft.
1,700—no haul.

24,690

E Street S. E.—No Change.

E Street—Contract No. 264.

1. 4,981.88 cub. yds. grading, at 40c	$1,992.75
2. 24,229.62 cub. yds. grading, at 30c	7,268.89
3. 24,824.40 cub. yds. haul 1,134 ft. over 200 ft., at 1¼c	3,517.62
4. 4,387.10 cub. yds. haul 2,800 ft. over 200 ft., at 1¼c	1,535.48
5. 1,602.22 sq. yds. brick pavement laid, at $1.00	1,602.22
6. 37 sq. yds. cobblestone pavement laid, at 70c	25.90
7. 1,227 lin. ft. 5″ b. s. curb and setting, at $1.20	1,472.40

8. 14.1 lin. ft. granite cir. curb and setting, at $2.05.....	28.91
9. 24 running ft. gutter flag laid, at 35c.....	8.40
10. 136 running ft. gutter flag laid, at 48c.....	65.28
11. 2,114 cub. yds. grading, at 30c.....	634.20
12. 2,114 cub. yds. haul 2,626 ft. over 200 ft. at 1¼c.....	693.81
13. Sewer work on E, viz:	
14. 104 lin. ft. 12″ sewer pipe, at 88c.....	91.52
15. 48 lin. ft. 6″ sewer pipe, at 36c.....	17.28
16. 6 lin. ft. 12″ x 6″ connections, at $1.38.....	8.28
17. 1 manhole 7′ deep.....	42.24
18. 83.6 cub. yds. excavation, at 40c.....	33.44
	19,038.62

X.

On July 23, 1872, the Board of Public Works awarded to the claimant another contract, designated as contract No. 413, in these words:

"*Contract No.* 413.

This contract, made and concluded this twenty-third day of July, in the year one thousand eight hundred and seventy-two, by and between . . . the Board of Public Works of the District of Columbia, of the first part, and Elias E. Barnes, of Washington, D. C., of the second part, witnesseth:

"First, that the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish, at his own proper cost and expense, all the necessary materials and labor, and, in a good, firm, and substantial manner to grade, set the curbstones, and lay and put down the brick foot pavements on Second street east, between Maryland and Virginia avenues; on Third street east, between Maryland and Virginia avenues, and on Fourth street east, between Maryland and Virginia avenues, and on Fourth street east, between Maryland and Pennsylvania avenues, in the city of Washington, D. C. Also to construct a fifteen (15) inch pipe sewer on the west side of said Second street east, between East Capitol street and Pennsylvania avenue, with the necessary manholes and traps; the work of said grading, curbing, brick paving, and sewering to be done and completed in accordance with the specifications following, to-wit:

* * * * * * *

"Sixth and eighth. (Same as sixth and eighth in contract No. 264.)

* * * * * * *

"Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

"Grading thirty (30) cents per cubic yards; including the first two hundred (200) feet of hauling.

"For every additional two hundred (200) feet of hauling per cubic yard, one (1) cent.

"Setting curbstones (new 8″) per lin. ft., forty (40) cents
" " (new 6″) " " " thirty (30) cents
" " (new 5″) " " " twenty-five (25) cents
"Resetting " (old 4″) " " " fifteen (15) cents
"Laying brick pavement, new, per sq. yd. eighty (80) cents
"Relaying brick pavement, old, per sq. yd. twenty-five (25) cents
"Provided, that bricks shall be furnished by the board at a price not exceeding eleven dollars and fifty ($11.50) cents per thousand.
"Fifteen (15″) inch pipe per lin. ft., $1.33.
"Six (6″) inch pipe " " " thirty six (36) cents.

Manholes:

6 feet deep or under	$31.68
Over 6 feet deep and more than 8 feet	42.24
" 8 " " " " " 10 "	52.80
" 10 " " " " " 12 "	63.36
" 12 " "	73.92

Traps:

Old corporation patterns	145.38
Chase's pattern	114.58

"Which said sums or prices the said party of the first part shall pay to the said party of the second part, as herein provided.

"Eleventh. It is further agreed that the measurements shall be made by the engineer of the said party of the first part, or his assistants."

At the time said contract was awarded the contract clerk of said board notified the claimant in writing, about which there is no controversy, that said contract had been awarded to him at board rates, but the court finds that the evidence fails to show that the board awarded said contract at said rates, or at any other rates than those set forth in the contract aforesaid, or that any mistake was made in the omission therefrom of the rate for old gravel streets.

XI.

That subsequent to the execution of said contract No. 413 the claimant entered into other contracts with the Commissioners of said District, known as extensions thereof, in these words:

"*First Extension of Contract No.* 413.

"For and in consideration of the stipulations hereinafter contained it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 413 in the series of contracts made by the Board of Public Works of the District of Columbia be and the same is hereby extended with its various terms, conditions, and stipulations to embrace the following work, to wit:

"Grade 3d street east, between Virginia avenue and Eastern branch; N street south, between 2d and 4th streets east; M street south, between 2d and 4th streets east, and reset the curbs and relay the brick foot-pavements on said streets where ordered by the engineer of the D. C.

"It is further agreed that the said Elias E. Barnes shall receive the price established and paid by the Board of Public Works for work of similar character, provided payment shall be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value. * * *

"In witness whereof the Commissioners of the District of Columbia, successors to the Board of Public Works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purpose-,' approved June 20, 1874, and the party of the second part to these presents have hereunto set their hands and seals this 19th day of August, 1875."

"*Second Extension of Contract No.* 413.

"(Memorandum in red ink:) Cancelled so far as relates to cobblestone pavement on M St. south, bet. S. Cap. St. and 4½ street west, and bet. New Jersey Ave. and 4th street east. (See extension same No. 413.)

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 413, in the series of contracts made by the Board of Public Works of the District of Columbia, be, and the same is hereby, extended with its various terms, conditions, and stipulations to embrace the following work, to wit:

"Set the curbs and lay the brick sidewalks on M street south, between 2nd street west and 4th street east, according to specifications.

"Also grade, set the curbs, lay the brick pavements, and lay and put down the 12-inch pipe sewers where ordered on C street south, from 2nd street east to South Capitol street, according to specifications. All suitable old material to be replaced.

"Also lay cobblestone pavement on M street south, between 4½ street west and 4th street east.

"It is further agreed that the work specified to be done under this agreement shall be completed by the first day of November, 1875; and if not so completed by said date the party of the second part hereto shall forfeit all right and title to perform the work herein described.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the Board of Public Works of the District of Columbia for work of similar character; provided that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value. * * *

"In witness whereof the Commissioners of the District of Columbia, successors to the Board of Public Works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purpose-,' approved June 20, 1874, and the party of the second part to these presents have hereunto set their hands and seals this 19th day of August, 1875."

"*Third Extension of Contract No.* 413.

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 413, in the series of contracts made by the Board of Public Works of the District of Columbia, be, and the same is hereby, extended with its various terms, conditions and stipulations, to embrace the following work according to specifications hereunto annexed, to wit:

"Lay and put down Belgian granite block pavement on the carriage-way of 3d street east, between D street south and Virginia avenue, and the blue-rock pavement on 3d street east, between Virginia avenue and N street south, and gravel the roadway of D street south, between New Jersey avenue and 6th street east; grade and relay the old material on C street south, between 2d and 3d streets east. Also grade, set the curbs, and lay brick pavements on D street south, between New Jersey avenue and South Capitol street.

"It is further agreed that the work specified herein shall be completed by the 30th day of November, 1875, under penalty of forfeiture of all right and title to perform the same.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the Board of Public Works for work of similar character: Provided, that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress, approved June 20, 1874, which bonds shall be accepted and received at their par value.

* * * * * * *

"In witness whereof the Commissioners of the District of Columbia, successors to the late Board of Public Works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purposes,' approved June 20, 1874, and the party of the second part to these presents has hereunto set his hand and seal this 12th day of Nov., 1875.

"*Fourth Extension of Contract No.* 413.

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes, that contract No. 413, in the series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit:

"Lay and put down blue-stone pavement on the carriage way of M street, south, between South Capitol street and 4½ street west, and between New Jersey avenue and Fourth street east, (this work is in lieu of cobblestone pavement on said street between the points named).

"It is further agreed that the work herein specified shall be completed by the 30th day of December, 1875, under penalty of forfeiture of all right and title to perform the same.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the Board of Public Works for work of similar character: Provided, that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

* * * * * * *

"In witness whereof the Commissioners of the District of Columbia, successors to the late Board of Public Works, etc., etc."

XII.

Under said contract 413 and the several extensions thereof set forth in the preceding finding, the claimant performed the following work on C street southeast and M street southwest at the prices hereinafter named,—that is to say:

C Street S. E.—Contract 413.

1.	2,847.40 sq. yds. brick pavement laid, at $1.....	$2,847.40
2.	8.33 sq. yds. old brick pavement relaid, at 25c.....	2.08
3.	865.67 sq. yds. cobblestone pavement laid, at 70c.....	605.96
4.	2,141 lin. ft. 5″ b. s. curb and setting, at $1.20.....	2,569.20

5.	34.5 lin. ft. 5″ curb reset, at 25c	8.62
6.	10.5 lin. ft. 6″ curb reset, at 30c	3.15
7.	21.35 lin. ft. 6″ granite cir. curb and setting, at $2.05	43.77
8.	6.25 lin. ft. 6″ granite cir. curb reset, at 30c	1.87
9.	2,191 running ft. 12″ gutter flag laid, at 35c	766.85
10.	207 running ft. 16″ gutter flag laid, at 48c	99.36
11.	2,848.6 cub. yds. grading, at 40c	1,139.44
12.	4,469.6 cub. yds. grading, at 30c	1,340.88
13.	7,318.2 cub. yds. haul, 1,220 ft. over 200 ft., at 1¼c. = 0.1525	1,116.02
14.	3,060 sq. ft. graveling, per yd. 15c	459.00
15.	1,326 ft. b. s. curb. redressed, at 20c	265.20
16.	Sewer work, Second to Third St., viz:	
	298 lin. ft. 12″ sewer pipe and laying at 88c	262.24
	21 lin. ft. 6″ sewer pipe and laying, at 36c	7.56
	30 lin. ft. 12″ x 6″ connection pipe and laying, at $1.38	41.40
	3 manholes 10′ to 12′ deep, at $63.36	190.08
	310.72 cub. yds. of excavation, at 40c	124.29
		11,894.37

M Street S. W.—Contract 413.

1.	3,406 sq. ft. 16-in. crossing laid, at 60c	$2,043.60
2.	6,747.10 sq. yds. brick pavement laid at $1	6,747.10
3.	5,723.78 sq. yds. cobblestone pavement laid, at 70c	4,006.64
4.	6,401 lin. ft. 5″ b. s. curb and setting, at $1.20	7,681.20
5.	65.8 lin. ft. granite cir. curb, Gleason pattern, at $2.05	134.89
6.	101 lin. ft. granite cir. curb and setting, at $2.05	207.05
7.	6,025 running ft. 12″ gutter flag laid, at 35c	2,108.75
8.	1,481 running ft. 16-in new gutter flag laid, at 48c	710.88
9.	19,849 cub. yds. grading, at 30c	5,954.70
10.	9,867 cub. yds. grading, at 40c	3,946.80
11.	29,716 cub. yds. haul 736 ft. over 200 ft., at .092	2,733.87
12.	6,973.23 sq. yds. blue rock pavement laid, at $1.75 per yd	12,203.15
13.	4,097 cub. yds. grading, at 30c	1,229.10
14.	4,097 cub. yds. extra haul, at 1¼c	376.92
		50,084.65

XIII.

At the time of the award of said contract 413 the established grade of Third street between Pennsylvania avenue and Virginia avenue required the excavation of 7,078 cubic yards of earth, which was completed in 1873.

That by reason of the change of grade of North Carolina avenue by the Commissioners in 1874, as hereinbefore set forth, it became necessary to further grade Third street to conform to the new grade

so established; and under the terms of said contract 413 and the extensions thereof, and by the direction of said Commissioners, and with the agreement and understanding that said Commissioners would pay him the board rates for the extra excavation and for the haul in 3.65 per cent. bonds of said District, as set forth in finding 5, the claimant performed the following work on Third street, to wit:

Third Street—Contract 413.

1.	5,030.5 sq. yds. Belgian pavement laid, at $3.50.....	$17,606.75
2.	See item 4.	
3.	198.8 sq. yds. cobblestone, at 70c.....	139.16
4.	747.4 sq. ft. flag crossing, at 60c.....	448.44
5.	122 running ft. 12″ gutter flag, at 35c.....	42.70
6.	1,956 cub. yds. grading, at 30c.....	586.80
7.	1,000 cubic yds. haul, 2,900 ft. over 200 ft., at 1¼c. per 100 ft.....	362.50
8.	1,802 cub. yds. grading, at 30c.....	540.60
9.	3,734 cubic yds. grading, at 40c.....	1,493.60
10.	5,536 cubic yds. haul, 1,412 ft. over 200 —, at 1¼c...	977.10
11.	Lowering and repairs of water mains.....	399.30
12.	4,521.82 sq. yds. brick pavement laid, at $1.....	4,521.82
13.	2,815 running ft. 5″ b. s. curb and setting, at $1.20...	3,378.00
14.	713 running ft. 6″ b. s. curb and setting, at $1.42.....	1,012.46
15.	4 running ft. 6″ granite circular curb set, at $1.42...	5.68
16.	18.6 running ft. 6″ granite circular curb reset, at 30c.....	5.58
17.	32.3 running ft. 6″ granite circular curb set, at $2.05..	66.20
18.	3 running ft. 6″ b. s. circular curb set, at $2.05.....	6.15
19.	6.75 running ft. 4″ b. s. circular curb set, at $2.05.....	13.83
20.	288 running ft. 5″ b. s. circular curb reset, at 25c...	72.00
21.	22,248.83 cub. yds. excavation, at 30c.....	6,674.64
22.	7,078 cubic yds. excavation, at 30c.....	2,123.40
23.	7,078 cubic yds. haul, 1,655 ft. over 200 ft., at ½c. .0827c.....	585.35
24.	22,248.83 cubic yds. haul, 1,655 ft. over 200 ft., at 1¼c., .2068c.....	4,601.05
25.	918.13 sq. yds. sodding, at 50c.....	459.06
26.	1,219 lin. ft. 15″ pipe and laying, at $1.33.....	1,621.27
27.	3 manholes, 8′–10′ deep, at $52.80.....	158.40
28.	9 manholes, 10′–12′ deep, at $63.36	570.24
29.	2 manholes, 12′–14′ deep, at $73.92	147.84
30.	2 manholes, 14′–16′ deep, at $84.48.....	168.96
31.	1 manhole, 16′–18′ deep	95.04
32.	Additional on 1,630.14 cubic yds. excavation over 16 ft. deep.....	233.15
33.	8 receiving basins, at $138.80	1,110.40
34.	2 receiving basins and traps, at $145.38	290.76
35.	1,103 lin. ft. 36″ sewer, 168,851 bricks, at $23 per M..	3,883.57

36. 4,555.54 cubic yds. excavation, at 40c	1,822.21
37. 159 lin. ft. 12″ gutter flag, at 88c	139.92
38. 9 lin. ft. 18″ gutter flag, at $1.62	14.58
39. 609 lin. ft. 6″ gutter flag, at 36c	219.24
40. 34 lin. ft. 15 x 6 connections, at $1.80	61.20
Total	56,658.95

The excavation and haul mentioned in items 21 and 24 were for work done in 1874 and thereafter under the direction and verbal agreement of the Commissioners of said District as aforesaid, which work was accepted by said Commissioners and the District received the benefit thereof.

XIV.

The claimant also did the following work by order of the Board of Public Works, but not under written contract, admitted by defendant to be correct and of which defendant received the full benefit:

441.33 sq. yds. brick pavement laid, at $1	$441.33
301.5 lin. ft. 5″ b. s. curb, at $1.20	361.80
119 cub. yds. grading, at 30c	35.70
119 cub. yds. hauled 1,320 ft. over 200 ft. at 16½c	19.63
3 lin. ft. 15″ pipe and laying, at $1.33	3.99
24 lin. ft. 6″ pipe and laying, at 36c	8.64
3 lin. ft. 18″ pipe, and laying, at $1.62	4.86
2 manholes 10′–12′ deep, at $63.36	126.72
1 manhole 18′–20′ deep	105.60
462.9 lin. ft. 36″ brick sewer, 80,081.7 brick, at $23 per M.	1,841.88
2,009.39 cub. yds. excavation, at 40c	803.75
Additional for 955.57 cub. yds. excavation over 16 ft. deep, at 37c	353.56
9 yds. hauled, at 1½c	19.63
9 yds. hauled, at ½c	7.85
	4,134.94

XV.

Said Barnes also, in pursuance of his several contracts with the defendants and the several extensions thereof, dressed and joined old curb to amount in value, at regular prices, of $2,643.48, as stated in the first paragraph of his amended petition filed and allowed April 14, 1887. Conceded by defendant.

XVI.

The claimant has received payments on account of the work herein elsewhere mentioned aggregating	$178,949.57
And materials the value of	22,748.11
Also sand of the value conceded	350.00
	202,047.68

XVII.

Counterclaim.

1. Under said contract 413, for work done after January 1, 1873, but prior to the extra work performed under the verbal agreement between the claimant and the Commissioners of said District as set forth in finding 13, on that part of Second street between Pennsylvania and Maryland avenues included in the original written contract, but not in any extensions thereof, partial measurements were made by the engineer and certified to the auditor, and in the certificate were the following quoted items, among others:

"5,539 cubic yds. grading, 30c. per yard;
"9,886 cubic yds. excavation hauled 2,300 feet over 200 ft., at 1 ct. per yard per 200 feet over 200 feet,"

which was the written contract rate.

Partial payment was made by the Board of Public Works in accordance therewith September, 1873.

On final measurement the board of audit restated the whole account March 19, 1875; allowed 40 cents a yard for said grading, which exceeded the amount at written contract rates by $553, and allowed 1¼ cents per yard for said haul per 100 feet over 200 feet, which exceeded the amount at written contract rates by $1,705.33, and payment was made accordingly.

2. Under said contract 413, said Barnes, after January 1, 1873, but before the verbal agreement between him and the Commissioners for the extra work set forth in said finding 13, did other work on Second street, between Pennsylvania and Virginia avenues, included in said original contract and not in any extension thereof. In the certificate of final measurement, made January 9, 1874, the following, among others, appeared:

"8,400 cubic yds. grading, 40 cts., which in amount exceeded that at written contract rates in the sum of $840;
"19,566 cubic yds. excavation hauled 2,400 feet over 200 ft., 1¼ cts. per yard per 100 ft. over 200 ft.;"

which in amount exceeded that at written contract rates by the sum of $3,521.88, and partial payments were made by the Board of Public Works.

Subsequently, March 19, 1875, the board of audit, after deducting the partial payments referred to, made final payment of the balance in accordance with said statement.

3. Under said contract 413, said Barnes, after January 1, 1873, and prior to the verbal agreement between him and the Commissioners, set forth in said finding 13, did other work on Third street, between Pennsylvania and Maryland avenues, included in the orig-

inal contract, but not in any extension thereof. Final measurement and certificates were made and paid October 8, 1873, by the Board of Public Works, in which the following quoted items appear, among others:

"7,010 cubic yds. grading 40 cts. per yard,"

which in amount exceeded that at written contract rates by the sum of $701;

"15,141 cubic yds. excavation, hauled 2,400 cubic yards, 1¼ cts. per yard per 100 ft. over 200 ft.,"

which in amount exceeded that at original written contract rates by the sum of $2,725.38.

4. Under said original contract 413 said Barnes, after January 1, 1873, and before the verbal agreement for the extra work between him and the Commissioners as set forth in said finding 13, did other work on Fourth street east, between Pennsylvania and Maryland avenues, included in the original written contract and not in any extension thereof. Final remeasurement was made and certified October 10, 1873, and the full amount paid in accordance therewith by the Board of Public Works November 12, 1873, in which the following items appear:

"7,000 cubic yds. grading, 40 cts. per yard,"

which in amount exceeded that at written contract rates by the sum of $700;

"10,192 cubic yds. hauled 3,000 feet over 200 feet, 1¼ cents per yard per 100 ft. over 200 ft.,"

which in amount exceeded that at written contract rates by the sum of $2,293.20

XVIII.

Assignments.

November 17, 1877, said Barnes assigned to Samuel J. Ritchie $6,000 of what might be due from the District to said Barnes, and June 28, 1878, he assigned the further sum of $5,000, and January 16, 1879, the further sum of $1,000, aggregating $12,000, as conceded by the parties without controversy.

Conclusions of Law.

Upon the foregoing findings of fact the court decide as conclusions of law:

1. That contract 264 be and the same is hereby reformed so as to incorporate therein the rate of 40 cents per cubic yard for old

gravel streets to a depth of 2 feet to conform to the intention of the parties as set forth in finding 2.

2. That by reason of the facts set forth in finding 10 the claimant is not entitled to a reformation of contract 413 in respect to said rate for old gravel streets.

3. That the claimant is entitled to be allowed on findings 9, 12, 13, 14 and 15 the sum of $238,781.94, less the sum of $202,047.68 heretofore paid said claimant, leaving a balance in his favor of $36,734.26.

4. The defendants must be allowed for the overpayments above those agreed upon in the written contracts as stated in finding 17 the sum of $13,039.79.

5. On the whole case, after deducting the one from the other sum, the claimant is entitled to judgment against the defendants for the difference, being $23,694.47, due and payable March 1, 1876, of which sum there shall be paid to said Samuel J. Ritchie, assignee as aforesaid, as agreed by said claimant, and which is hereby ordered, the sum of $12,000.

(Record, page 51.)

XIV.—*Judgment of the Court, Entered March* 31, 1902.

ELIAS E. BARNES
vs.
THE DISTRICT OF COLUMBIA.

At a Court of Claims held in the city of Washington, on the 31st day of March, 1902, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge and decree that the said Elias E. Barnes do have and recover in the manner provided by the act of June 16, 1880, chapter two hundred and fifty-three, the sum of twenty-three thousand six hundred and ninety-four 47/100 dollars ($23,694.47) upon debts of the District of Columbia due and payable March 1, 1876 within the meaning of the sixth section of the said act; twelve thousand dollars ($12,000) of said sum are to be paid to Samuel J. Ritchie assignee of said Barnes.

BY THE COURT.

(Record, page 51.)

XV.—*Defendant's Application for and Allowance of Appeal.*

From the judgment rendered in the above-entitled cause, on the 31st day of March, 1902 in favor of the claimant, the defendant, by its Attorney General on the 22nd day of April, 1902, makes applica-

tion for, and gives notice of an appeal to the Supreme Court of the United States.

L. A. PRADT,
Ass't Attorney General.
ROBERT A. HOWARD,
Special Assistant Attorney.

Filed April 22, 1902.
Allowed June 26, 1902 in open court.

LAWRENCE WELDON,
Presiding Judge.

(Record, page 52.)

XVI. Mandate of the Supreme Court of the United States dismissing the appeal for want of jurisdiction filed in the Court of Claims January 12, 1903.

A mandate of the Supreme Court of the United States dated January 8, 1903 in the above-entitled cause was filed in the Court of Claims January 12, 1903, in which it is ordered that

"Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and on a motion to dismiss, which was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that this appeal be, and the same is hereby dismissed for the want of jurisdiction. December 8, 1902."

(Record, page 53.)

Motion of Defendant for Appeal under the Act of March 3, 1903.

Filed May 11, 1903.

ELIAS E. BARNES
v.
THE DISTRICT OF COLUMBIA. } No. 47, D. C.

Motion for allowance of appeal, provided for by the act of March 3, 1903.

Petitioner states that from the judgment rendered in this case on March 31st, 1902, an appeal was allowed by this court to the Supreme Court: that on filing the transcript in the Supreme Court, the claimant interposed a motion to dismiss the appeal for want of jurisdiction in the court to entertain the same. This motion was

based upon the following provision of law, embraced in the act of June 6, 1900, (c. 789, 31 St. L. 572):

Defending suits in claims.—For defending suits in the United States Court of Claims, two thousand dollars: *Provided, that no judgment heretofore or hereafter rendered under the act of June sixteenth, eighteen hundred and eighty*, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' *shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by Congress.*

This motion was allowed and the appeal dismissed.

Subsequently, the following provision was enacted, in "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, nineteen hundred and three, and for prior years, and for other purposes."

(C. 1006, St. 2d Sess. 57th Cong. 1031, 1070.)

For the payment of the judgments except the judgment in favor of Elias E. Barnes, rendered by the Court of Claims, reported to Congress at its present session in House document numbered 360 and Senate documents numbered one hundred and eighty-seven and two hundred, two hundred and ninety thousand three hundred and fifty-four dollars and forty-nine cents: Provided, that none of the judgments herein provided for shall be paid until the right of appeal shall have expired: And provided further, that the proviso contained in the act approved the sixth day of June, anno Domini nineteen hundred, entitled "An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes," which reads as follows: Provided, that no judgment heretofore or hereafter rendered under the act of June sixteenth, eighteen hundred and eighty, entitled "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes," shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by Congress, be, and the same is hereby repealed: and from all final judgments or decrees heretofore rendered in suits of the character of those mentioned in said proviso an appeal shall be allowed to the Supreme Court of the United States at any time within ninety days after the passage of this act, except in cases where the amounts found due by said court have been paid at the Treasury.

And your petitioner states that this judgment in favor of Elias E. Barnes is the judgment hereinbefore recited and that the same has not been paid at the Treasury.

Wherefore, comes petitioner, on this 11th day of May, 1903, a day within ninety days after the passage of the afore-mentioned act of

March 3, 1903, and prays this honorable court, that the allowance of an appeal, from the judgment rendered herein on March 31, 1902, be granted to the defendant.

L. A. PRADT,
Assistant Attorney General.

ROBERT A. HOWARD,
U. S. Special Attorney.

Filed May 11, 1903 and ordered to the law calendar.

October 26, 1903.—Ordered that the appeal be allowed as prayed for.

BY THE COURT.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 143.

THE DISTRICT OF COLUMBIA, APPELLANT,

v.

ELIAS E. BARNES.

CERTIFIED COPY OF DOCKET ENTRIES IN THE COURT OF CLAIMS.

FILED NOVEMBER 21, 1903.

(19135)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

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a D. C. 47.

Copy of docket entries. F. H. W.

1 ELIAS E. BARNES
v.
THE DISTRICT OF COLUMBIA. } No. 47.

Aug. 4, 1880.	Orig. petition filed. Atty. Gen. notified. Testimony ordered. Printed petition filed; 5 to Atty. General. Call on Commissioners issued.
Aug. 31, 1880.	Call on Commrs. D. C. returned & atty. notified.
Sept. 6, "	Traverse filed & atty. notified.
" 28, "	Call on Commrs. D. C. reissued.
Nov. 20, "	Petition of Saml. J. Ritchie to intervene filed and claimant and defts. notified by Shellabarger and Wilson. Filed by leave of judge at chambers.
Nov. 26, "	Printed petition of S. J. Ritchie recd. & five to Atty. Genl.
Dec. 10, "	Traverse filed and atty. notified.
Jany. 11, 1881.	Answer of claimant to petition of S. J. Ritchie filed and parties notified.
Feb. 12, 1881.	Reply of Commrs. of D. C. filed transmitting 1st contracts B. P. W. Nos. 264, 413, and 843—three extensions of 264 and four extensions of No. 413. 2d, B. P. W. vouchers Nos. 3623, 2836, of 1872; 1006, 2943–4, 3276–8, 3733–45, of 1873; 303 of 1874. Board of audit claims, class 4, Nos. 441, 1281, 1471, 1500, 1593, 1622, 1961, 2003, 2021, 2041, 2109, 2123, 2270, 2280, 2428, 2493, 2502, 2507, 2524, 2568, & 2571. Engineers' accounts, 1171, 1192, 1200, 1201, 1216, 1230, & copy of 1324.

2 D. C., 47.

3d, disallowed claims, class 4, No. 765 (papers numbered in red ink from one to forty-six, inclusive), and parties notified.

Feb. 17, 1881. Printed copies of answer of claimant E. E. Barnes to petition of S. J. Ritchie rec'd, & five to Asst. Atty. Gen.

April 7, 1881. Motion to substitute R. B. Mitchell as atty. of record (S. M. Wilcox consenting) filed & defts. notified. (Motion allowed.)

April 13, 1881. Motion of Asst. Atty. Gen'l for leave to withdraw papers returned by Commrs. filed & allowed & papers receipted for and withdrawn by J. C. Fay, esq., for deft.

April 19, 1881. Depositions of M. Marceron, J. Fitzpatrick, W. Beron, J. Gray, P. Maloney, A. Gleason, W. C. Murdock, G. Neitzy, S. N. Hilton, W. Hussey, C. Nice, J. Alman, E. E. Barnes, & C. A. Appel, for claimant, filed & parties notified.

July 7, 1881. Case entered on notice book by clm't.

August 1, " Depns. Geo. H. Bailey & others filed for defendants, and Exhibit G. H. B. Atty. notified.

Sept. 20, 1881. Motion for leave to file amended petition & bill of particulars filed by claimant & allowed.

" " " Amended petitions & copies filed & five to defts.

Nov. 29, 1881. Deposition of J. A. Osborne for defts. filed and parties notified.

Jan'y 26, 1882. Plea of set-off filed & atty. notified.

Feb. 10, 1882. Declaration of claimant suggesting death R. B. Mitchell, esq., his atty. of record, and substituting H. E. Paine, atty. of record.

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Feb. 10, 1882. H. E. Paine, esq., as his atty., and defts. notified.

Feb. 21, 1882. Replication to plea of set-off filed and defts. notified.

Depositions of S. McMahon, P. Cullinane, J. A. De Wandalier, H. J. McLaughlin, D. Nalley, J. T. Ballenger, H. Hurt, S. Cook, T. McCaffrey, and E. E. Barnes, for claimant, filed and parties notified.

Mch. 6, 1882. Request of H. E. Paine, esq., to withdraw as atty. of record filed & defts. notified.

" 6, 1882. Motion of claimant to appoint Reginald Fendall, esq., atty. of record in place of H. E. Paine, esq., filed & defts notified. Allowed.

Reginald Fendall, atty. of record.

March 8, 1882. Printed copies of replication of Feb. 10, 1882, rec'd and five to defts.

April 1, 1882. Papers withdrawn April 13, 1881, returned by defts. p. J. C. Fay, esq.

April 5, 1882. Call on Commrs. D. C. issued.

" 10, " Reply of Commrs. D. C. to call of April 5, 1882, transmitting contracts Nos. 28 and 36 (two papers) & parties notified.

May 4, 1882. Continued.

Mch. 17, 1883. Motion for reference to Engineer Commr. to make certain computations and measurements filed by clmt. and referred to law docket.

" 17, " Call on Commrs. D. C. issued.

Mch. 19, " Motion of March 17, 1883, argued & submitted.

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Mch. 22, 1883. Motion to substitute J. W. and G. L. Douglass attys. of record (former atty. consenting) filed & deft. notified. Allowed.

J. W. & G. L. Douglass, attys. of record.

Mch. 22, 1883. Power of atty. filed.

Mch. 31, 1883. Reply of Commrs. D. C. filed transmitting auditor's vouchers B. P. W. Nos. 3116, 3311, 3355, of 1872; No. 563, of 1873. Board of audit claim, class 4, No. 2348 (five papers). Parties notified.

Mch. 31, 1883. Motion for leave to file amended petition filed and defts. notified. Allowed.

Mch. 31, 1883. Amended petition filed.

April 2, " Motion to refer case to referee filed and referred to law docket. Defts. notified.

April 3, 1883. Motion for leave to amend petition filed. Defts. notified. Allowed.

" 5, " Printed copies of amended petition rec'd, and five to defts.

April 9, 1883. Referred to A. A. Hosmer, esq., to take & state account, &c. (See Journal 6, page 221.)

April 21, 1883. Motion for leave to withdraw certain original papers filed by defts. and allowed, and papers taken and receipted for by Mr. Fay.

April 26, 1883. Depositions of Wm. Hussey, S. D. Charles, E. E. Barnes, and S. L. Phelps, for claimant, filed and parties notified.

April 26, " Receipt of A. A. Hosmer as referee for depns. filed Apr. 26, 1883, filed. Returned June 19, 1883.

May 1, 1883. Call on Commrs. D. C. issued.

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May 7, 1883. Continued.

Nov. 2, " Depns. of Rock & Hoxie filed for deft. Parties notified.

Mch. 20, 1884. Reply of Commrs. D. C. filed transmitting receipts of E. E. Barnes, Nos. 1446, 1447, 1737, 1738, 1771, 2086, 2098 of 1872; Nos. 1446, 1771, 2260, 2459, 2713, 3026, 3209, 3293, 3465 of 1873; Nos. 2210, 2854, 3190, 4545, and 5079 of 1874; Nos. 4308, 5035, 6205, 6306, 6494, 6791, 6889, 6921, 7204, 7238, 7322, 7375, 7528, 8419, 8918, 9093, and 11011 of 1875—(thirty-eight papers). Parties notified.

June 2, 1884. See Journal 6, page 419, for order for payment of referee.

Feb. 2, 1885. Receipt of A. A. Hosmer, esq., referee for certain papers filed.

May 5, 1885. Report of A. A. Hosmer, referee, filed with accompanying papers marked schedules Nos. 1 to 9, inclusive, and papers marked A. A. H. Nos. 10, 11, & 12, and sundry papers numbered in red ink from 1 to 95, inclusive, filed by referee. Parties notified.

May 25, 1885. See Journal 7, page 91, for order for payment of referee.
Oct. 30, 1885. Exceptions to report of referee by claimant filed, defts. notified.
Mch. 4, 1886. Request of defts. to withdraw papers filed allowed; receipted for.

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April 19, 1886. Depns. of E. Barnes, J. F. Acker & D. Donovan for clmt. filed. Parties notified.
May 17, 1886. Claimant's requests for facts filed; 5 to defts.
" 18, " Printed copies of claimant's exceptions to report recd.; 5 to defts.
" 18, " Claimant's brief on exceptions filed; 5 to defts.
" 20, " Two requests of defts. for papers filed; allowed; receipted for.
" 21, "
May 26, 1886, Exceptions to report of referee filed by defts.
May 26, 1886. Defts. brief on exceptions filed.
May 26, 1886. Argument of case begun.
" 27, 1886. Continued.
June 3, 1886. Papers withdrawn by defts. Mch. 4. '86, May 20 and 21, 1886, returned.
Nov. 29, 1886. Depns. of W. Forsyth, D. Donovan, and D. Warner for clmt. filed. Parties notified.
Jan'y 29, 1887. Request for all papers in this case filed by defts.; allowed; receipted for.
Mch. 22, 1887. Amended exceptions to report of referee filed by defts. in open court.
Mch. 22, 1887. Argument of case begun.
Mch. 29, 1887. Argument of case concluded and case submitted.
April 4, 1887. Motion of claimant for leave to file amendment to petition filed; defts. notified.
Oct. 31, 1887. Chief Justice read the opinion of the court. Judgment for defendants for $\$11{,}074.\frac{11}{100}$, and that the intervening petition of S. J. Ritchie be dismissed. Court filed findings of fact.

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Nov. 18, 1887. Motion for new trial filed by claimant; defts. notified.
Jan'y 25, 1888. Application of claimant for allowance of appeal filed in open court.
Aug. 8, 1893. Papers filed Feb. 12, 1881, April 10, 1882, March 31, 1883, & March 20, 1884; received & receipted for by W. Q. Roome, for Commrs. D. C. (See case No. 1.)
Mch. 28, 1895. Motion for new trial submitted.
April 1, 1895. Motion for new trial allowed.
May 14, 1895. Motion to refer case to John W. Anderson, referee, filed. Handed judges.
" 20, " Motion to refer to referee allowed. Oath of referee filed.

May 20, 1895. Motion of referee for leave to withdraw all papers filed; allowed. See his receipt endorsed on said motion.

Oct. 15, 1895. Papers returned by commr. or referee.

Oct. 15, 1895. Report of referee, J. W. Anderson, with Exhibits B & A filed. Parties notified.

Oct. 22, 1895. Motion of clm't atty. to confirm report of referee filed. To Law Calendar.

Oct. 29, " Exceptions to referee's report, by S. J. Ritchie, filed by Shellabarger & Wilson, his attys. Notice with copy to defts., also copy and notice to J. W. Douglass, esq., atty. for claimant.

Nov. 6, 1895. Mr. Fay, for claimants, filed in open court; stipulation

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of parties and motion that judgment be entered in accordance with said stipulation and the report of the referee.

Nov. 11, 1895. Conclusion of law filed by the court that claimant is entitled to the sum of $31,754.57 due, payable Jan'y 1, 1876, to be divided according to the stipulation of the parties Elias E. Barnes and Samuel J. Ritchie, and that judgment be and is hereby entered. To Elias E. Barnes $22,350.54, and to Samuel J. Ritchie $9,404.03.

Nov. 14, 1895. Attested transcript of judgment delivered to J. A. Douglass, esq., atty. of record.[a]

Feb'y 8, 1896. Application of defendants for appeal to Supreme Court of the United States filed. Atty. notified.

Mch. 23, 1896. Referees bill allowed for $300.

Mch. 24, 1896. Delivered to John W. Anderson a certified copy of the order of the court of March 23, 1896.

" 30, " Motion of claimant that court deny application of defendants for an appeal filed. Copy & notice to defts. handed judges. Order to be heard with the motion of defts.

Mch. 30, 1896. Assistant Atty. Gen'l Dodge moved in open court for the allowance of the appeal of the defendants, the consideration of which was postponed upon the suggestion of Mr. Douglass, atty. for clmt.

April 11, 1896. Defts. response to clmts. motion to deny application for appeal filed. Handed judges. Atty. notified.

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April 20, 1896. Defts. motion for new trial filed. Atty. notified. Handed judges. To law calendar.

April 29, " Defendants' motion for new trial and for allowance of appeal argued and submitted.

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[a] Across this paragraph in red ink: Mch. 4, 1900. This transcript was produced by Mr. Fay and cancelled as of Jna'y 18, 1876. J. Randolph, asst. clk.

May 18, 1896. Defts. motion for new trial allowed. (See order filed.)

May 21, 1896. Motion of clmt. to vacate order of court granting defts. a new trial filed. Copy. Notice to defts. Handed judges.

May 23, 1896. Defendants' exceptions to report of referee filed. Atty. notified.

May 25, 1896. Motion to vacate order granting defts. a new trial overruled.

Nov. 17, " Continued.

Jan'y 5, 1897. Papers formerly filed in this case numbered in red ink 1 to 5, 11 to 27, 29 to 46, 50½, 65 to 67, 69 to 71, 73 to 77, 79 to 93, 94, and 95, returned by Commrs. D. C. to the files in this case. Also Board of Audit, class 4, No. 441, received from Commrs. D. C. & filed. Parties notified.

Jan'y 6, 1897. Argument of case begun.

Jan'y 7, 1897. Argument of case closed, and case submitted.

Jan. 13, " Call on Commissioners D. C. allowed and issued.

Jan'y 16, 1897. Reply of Commrs. D. C. with Board of P. Works voucher No. 300 of 1874, 1480 of 1873, and 3654 of 1872, filed. Parties notified.

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Jan'y 21, 1897. Defts. printed brief of evidence filed. Atty. notified.

Nov. 5, 1897. Motion to remand case to general docket filed. Defts. consenting; allowed.

Mch. 14, 1898. Motion to refer case to referee filed; defts. notified. Handed judges.

April 5, 1898. Motion to refer to referee allowed. Case referred to Frank W. Hackett, esq., and referee notified.

Sept. 15, 1898. Depositions of F. H. Stier and W. H. H. Allen for claimant filed. Parties notified.

April 10, 1899. Call on Treasury Dept. filed; allowed; issued May 4, 1899.

May 12, 1899. Reply of Treasury Dept. filed. Parties notified.

June 23, 1899. Deposition of clmt. E. E. Barnes filed. Parties notified.

July 3, 1899. Three exhibits (Nos. 1, 2, & 3) to the depositions of E. E. Barnes filed. Parties notified.

Oct. 24, 1899. Call on Commissioners D. C. filed by claimant's atty. Handed judges.

Oct. 28, 1899. Above call allowed and issued.

Dec. 23, 1899. Reply of Commissioners D. C. (3 papers & 2 plots) filed. Parties notified.

Feb'y 6, 1900. Copy of request for return of certain papers (set out in accompanying receipt of Mr. Roome of Aug. 9, 1893), which request of the clerk was transmitted to the Commrs. D. C. per John C. Fay, esq., in a sealed packet. I. R. filed.

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Feb'y 19, 1900. The above receipt of Mr. Roome of Aug. 9, 1893, returned to the files by John C. Fay, esq., with an accompanying note.

July 18, 1900. Depositions of John F. Alexander, Elias E. Barnes for clmt. with accompanying Exhibits marked J. F. A., Nos. 1 to 10 & E. E. B., Nos. 1 to 5 filed. Parties notified.

Feb'y 5, 1901. Deposition of John F. Alexander for clmt. filed. Parties notified.

April 8, 1901. Clmt's request for findings of fact & brief filed; 5 copies & notice to defts.

May 14, 1901. Defendants' brief filed. Copy to J. W. Douglass, atty. of record.

May 16, 1901. Argued and submitted.

Oct. 9, 1901. Copy of letter to the Commissioners D. C. filed.

Nov. 4, 1901. Order filed remanding case for oral argument.

Dec. 5, 1901. Memoranda in response to memorandum of the court filed by clmt's atty.

Copies & notice to deft.

Dec. 12, 1901. Printed minute by the defts. of points ordered by the court for oral argument and explanation filed. Copies & notice to clmt's atty.

Dec. 19, 1901. Argument of case begun by Mr. Fay for the claimant.

Jan. 14, 1902. Further argument of case.

Jan. 15, 1902. Further argument of case.

Jan. 16, 1902. Call on Commissioners D. C. for temporary use of certain records of their office filed; allowed and issued.

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Jan. 16, 1902. Argument concluded & case submitted.

Jan. 16, 1902. Record books—two Journals Board of Public Works and one Ledger Board of Audit, received from Commrs. D. C. in response to call, and handed the court. These were returned to the said Commrs. Jan'y 17, 1902, per their messenger, J. E. Poole.

Mch. 11, 1902. Printed amended petition filed, with 25 printed copies; 5 copies & notice to defts.

Mch. 31, 1902. Court filed findings of fact and conclusions of law. Opinion by Peelle, J.

Judgment for claimant for $23,694.47, due and payable March 1, 1876.

April 22, 1902. Defts. application for an appeal filed. Attys. notified. Allowed June 26, 1902.

May 12, 1902. Order filed amending findings heretofore filed on the 31st of March, 1902.

June 4, 1902. Petition of defts. for amended & additional findings of fact, filed. Handed judges. Atty. notified.

June 23, 1902. Defts. motion for amended & additional findings overruled.

June 25, 1902. Application of and notice of appeal of clmt. from so much of judgment as allows counterclaim and refuses to reform contract 413 filed; defts. notified. Allowed July 17, 1902.

June 26, 1902. Defendants' exceptions to the findings of the court, and also to the refusal of the court to find additional findings, filed and overruled.

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June 26, 1902. Defts. exceptions to findings of court overruled June 26, 1902.

June 26, 1902. Defendants application for allowance of appeal filed April 22, 1902, allowed in open court this day.

July 21, 1902. Letter of Judge Peelle relative to record on appeal filed.

July 22, 1902. Attested transcript of judgment delivered to atty. of record.

July 24, 1902. Record on appeal delivered to Felix Brannigan, esq.

Jan'y 12, 1903. Mandate of the Supreme Court of the United States dismissing the appeal for want of jurisdiction filed in open court.

May 7, 1903. Motion of J. J. Hemphill to be entered as atty. of record of Samuel J. Ritchie with power of atty. filed. Handed judges.

May 11, 1903. Motion for allowance of appeal provided for by the act of March 3, 1903, filed. Copy & notice to clmts. atty. Handed judges. To law calendar.

May 23, 1903. Motion of May 7, 1903, allowed without prejudice to any right or lien of the former atty.

June 1, 1903. Claimants' application for appeal filed; defts. notified.

Oct. 19, 1903. The application for an appeal filed May 11, 1903, was argued by Mr. Howard for the motion and by Mr. Fay opposed, and submitted.

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Oct. 22, 1903. Clmts. brief on motion for a second appeal filed. Copies to defts.; also, copies sent to the court.

Oct. 26, 1903. Application of defendants for allowance of appeal to the Supreme Court, U. S. Allowed.

Oct. 27, 1903. Memorandum of points and authorities for the defts., on the motion for allowance of appeal filed. Atty. notified.

Nov., 1903. Delivered Asst. Atty. General Pradt record on appeal to the Supreme Court of the United States, and a certified copy of the general docket entries in this case.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing pages, numbered from one to fourteen, inclusive, contain a true and complete transcript of the general docket entries in the case of Elias E. Barnes vs. The District of Columbia, No. 47.

Test this 19th day of November, 1903.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

(Indorsed:) File No. 19135, Supreme Court, U. S., October term, 1904, term No. 143. The District of Columbia, appt., vs. Elias E. Barnes. Certified copy of docket entries in Court of Claims. Filed Nov. 21st, 1903.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE DISTRICT OF COLUMBIA, appellant, v. ELIAS E. BARNES. } No. 484.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT ON THE MOTION TO DISMISS.

Strictly speaking, this is not a second appeal from the judgment of the Court of Claims of March 31, 1902. Under the decision of this court, no appeal could heretofore have been entertained. This appeal is brought under the provisions of the act of June 16, 1880 (21 Stat. L., 284), and the act of March 3, 1903 (32 Stat. L., 1070). An appeal, heretofore sought to be brought under the act of 1880, was suspended by the intervention of the act of June 6, 1900 (31 Stat. L., 572). This appears, properly enough, in the statement of the appellee, who makes this motion.

I.

THE DISTRICT OF COLUMBIA AS A MUNICIPAL CORPORATION.

The first section of the act of February 21, 1871 (16 Stat. L., 419), creates a municipal corporation by the name of "The District of Columbia, by

which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation, not inconsistent with the Constitution and laws of the United States and the provisions of this act."

The twenty-fifth section of the act provides that the judicial courts of said District shall remain as now organized until abolished or changed by Congress.

The powers and jurisdiction of the courts of the District are the same as exercised by the circuit and district courts of the United States. (2 Stat. L., 105; Rev. Stat. D. C., sec. 760 et seq.)

This legislation is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia.

> *Parsons* v. *District of Columbia*, 170 U. S., 45, 52.
>
> *Wight* v. *Davidson*, 181 U. S., 371, 380, and cases cited.

The cases of *Barnes* v. *The District of Columbia*, and *Metropolitan Railroad Company* v. *The District of Columbia*, cited by the learned counsel for the appellee, were cases at common law; the one against the District for damages for personal injury in consequence of defective condition of

streets; the other an action of assumpsit, by the District against the company for work done, etc., in consequence of the failure of the company to comply with its duty under a statute, brought in the courts of the District, organized as above.

In the former case the court said:

> A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again, it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes the agency of the State, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action. (*Barnes* v. *District*, 91 U. S., 540.)

In the latter case, the court said:

> It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the Government of the United States. Its

> supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense. (*Metropolitan R. R. Co.* v. *District of Columbia*, 132 U. S., 1.)

The District of Columbia and the courts established therein are creations of Congress. It is not contended that the District, in matters of contract, has any sovereign rights and immunities. If suit had been brought against it in one of its courts, the same rules of procedure would have obtained as in suits between private parties; and the defenses, including limitation, could have been interposed. The right to sue and be sued and the forum in which suits could be maintained were within the absolute control of Congress. The suit at bar is not a suit brought under the statutes creating the municipality and the courts of the District. If it had been, the right to recover would have been barred by the statute of limitations.

II.

THE ACT OF JUNE 16, 1880 (21 STAT. L., 284), IS AN ACT CONFERRING JURISDICTION UPON THE COURT OF CLAIMS IN A PARTICULAR CLASS OF CASES; AND THE PROSECUTION, PRACTICE, HEARING, AND DETERMINATION OF THOSE CASES ARE EXCLUSIVELY WITHIN THE PROVISIONS OF THAT ACT.

The Court of Claims is a court created under constitutional provision, and is one of the inferior courts which Congress authorizes. (*U. S.* v. *Klein*, 13 Wall., 128, 138.) It has a general jurisdiction to render final judgments, by the acts of March 3, 1863 (12 Stat. L., 765), and March 3, 1887 (24 Stat. L., 505).

It has also had conferred upon it, by acts of Congress, jurisdiction in particular classes of cases and in many single claims for adjudication. For instance, the claim of the city of Carondelet, the French spoliation cases, the Pacific Railroad cases, the Cherokee Indian case, the Choctaw Indian case, the New York Indians, the La Abra and Weil Mexican award cases, and many individual cases growing out of collisions, etc.

The power of Congress to confer those jurisdictions is indisputable. Of such a character was the jurisdiction under which the suit at bar was instituted, conferred by the act of June 16, 1880.

By the first section of that act it was provided that the jurisdiction of the Court of Claims is hereby extended to, and it shall have original legal and equitable jurisdiction of, all claims now existing

against the District of Columbia arising out of contracts made by the late Board of Public Works and extensions thereof made by the Commissioners of the District of Columbia. * * * Said Court of Claims shall have the same power, proceed in the same manner, and be governed by the same rules in respect to the mode of hearing, adjudication, and determination of said claims as it now has in relation to the adjudication of claims against the United States.

By the second section it was provided: All such claims against the District of Columbia shall, in the first instance, be prosecuted before the Court of Claims by the contractor, his personal representatives or his assignee, in the same manner and subject to the same rules, so far as applicable, as claims against the United States are prosecuted therein, or to such other rules as the court shall prescribe. In any case, if before trial either party requests in writing a finding of facts by the court, there shall be the same right of appeal, either by the District of Columbia or by the claimants, and subject to the same rules and regulations as are prescribed by law for appeals on behalf of the United States, or claimants against the United States from the judgments of the Court of Claims.

By section third it is provided that the Attorney-General of the United States shall have authority, and it shall be his duty, to defend the District of Columbia against all such claims against said District of Columbia prosecuted in said Court of

Claims, and on appeal, in like manner as he is now by law required to defend the United States in said court, with the same power to interpose counterclaims and offsets against claims and defenses for frauds practiced or attempted and all other legal defenses, and with like power of appeal as in cases against the United States tried in said court.

By section four it is provided that all laws now in force relating to prosecutions of claims against the United States in the Court of Claims shall apply, as far as applicable, to the prosecution, practice, hearing, and determination of claims against the District of Columbia authorized to be prosecuted under the provisions of this act.

Under this act the claimant filed his petition and proceeded to trial. A judgment was rendered against him and in favor of the District upon a counterclaim. (22 C. Cls. R., 366.) A new trial was granted, and after proceedings, many of which were made subjects of exception, which will appear upon the trial of the merits, a judgment was entered in favor of the claimant. From that judgment an appeal was taken, which was dismissed by this court for want of jurisdiction, as appears in the statement of appellee. The present appeal was taken after the legislation, which also sufficiently appears in the statement of appellee. To avoid undue extension of this brief, I ask leave to thus refer to it.

These suits stand exactly upon the same authority as suits against the United States in the Court of Claims. They are not common law suits under the Constitution or the acts of Congress organizing the District and the courts thereof. They are brought by the consent of Congress; and in their prosecution and determination must be regulated by the act of permission to sue.

The act provides emphatically for the right of appeal. It was not only permitted, but it was made the duty of the Attorney-General to pursue that remedy. This statute, providing for the appeal, has never been repealed. The legislation upon the matter is, without a shadow of difference, the same as the legislation of the organic act of March 3, 1863, except that the provision making the granted right of appeal inoperative was in the belly of the act of 1863, while it was a subsequent enactment by Congress to the act of 1880. But in either case was the same manifest intention to preserve this invaluable right. And in both cases it was a pronounced essential condition to the operation of the remedy.

By the fifth section of the act of 1863 it was provided that either party may appeal to the Supreme Court of the United States from any final judgment or decree which may thereafter be rendered in any case by the Court of Claims wherein the amount in controversy exceeds $3,000, under such regulations as the Supreme Court may direct: *Provided*, That such appeal be taken

within ninety days after the rendition of such judgment or decree.

The seventh section provides that in all cases of final judgment by the Court of Claims, or, on appeal by the said Supreme Court, where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the said Court of Claims, and signed by the chief justice, or in his absence by the presiding judge of the court.

The fourteenth section provides that no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

In *Gordon's case* (2 Wall., 561) this court decided that the authority given to the head of an Executive Department by necessary implication in the fourteenth section of the amended Court of Claims act, to revise all the decisions of that court requiring payment of money, denies to it the judicial power from the exercise of which alone appeals can be taken to this court. The cause was dismissed for want of jurisdiction.

This judgment was announced on March 9, 1865. On March 17, 1866, Congress passed the following repealing act: That the fourteenth section of an

act approved the 3d day of March, 1863, * * * be, and the same is hereby repealed; and from the final judgment, or decree, in all cases heretofore decided by the Court of Claims, of the character mentioned in the fifth section of said act of March 3, 1863, an appeal shall be allowed to the Supreme Court of the United States, at any time within ninety days after the passage of this act, except in such cases where the amounts found due by said court have been paid at the Treasury. (14 Stat. L., 9.)

Since the passage of this repealing act the Supreme Court has taken jurisdiction of appeals from the Court of Claims. At the December term, 1866, the Supreme Court promulgated the rules regulating appeals provided for by the fifth section of the act of 1863.

In *De Groot* v. *United States* (5 Wall., 419), this court, by Mr. Justice Miller, said: "This is the first appeal from the Court of Claims which we have been called upon to consider since the rules framed by this court regulating such appeals. * * * This case, having been decided before they (the rules) were published, comes under the provisions of the second rule." That rule provides that, in all cases in which judgments or decrees have heretofore been rendered, when either party is by law entitled to an appeal, etc.

The *De Groot case* was decided in the Court of Claims at the October term, 1864, long before the

repealing act was passed, and was appealed under the provisions of that act.

In this same case the court said:

> It is true that, ordinarily, when we seek for the foundation of this jurisdiction (of cases in which the United States is defendant) we look to the general laws creating the court, and defining cases of which it may have cognizance. But it is equally true that whenever Congress chooses to withdraw from that jurisdiction any class of cases which before had been committed to its control, as it has done more than once, it has the power to do so, or to prescribe the rule by which such cases may be determined. Its right to do this in regard to any particular case, as well as to a class of cases, must rest on the same foundation; and no reason can be perceived why Congress may not at any time withdraw a particular case from the cognizance of that court, or prescribe in such case the circumstances under which alone the court may render a judgment against the Government.

Reverting to the statutes set out on the brief of appellee—the statute of June 6, 1900, which this court has decided gives a power of supervision to the Secretary of the Treasury over the action of the Court of Claims; and the statute of March 3, 1903, which repealed that provision—we find small difference, as to appeals, from the legislation connected with the organic act of 1863.

The appellee insists, with great vehemence, he had a final judgment on the 31st day of March, 1902. But, at his invitation, this court decided that he did not have such final judgment and dismissed an appeal therefrom. In the opinion prepared by Mr. Chief Justice Taney in *Gordon* v. *United States* (Appendix 117 U. S., 696) is the following language:

> It will be seen by the sections above quoted that the claimant whose claim has been allowed by the Court of Claims, or upon appeal by the Supreme Court, is to be paid out of any general appropriation made by law for the payment and satisfaction of private claims; but no payment of any such claim is to be made until the claim allowed has been estimated for by the Secretary of the Treasury, and Congress, upon such estimate, shall make an appropriation for its payment. Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment. Neither court can by any process enforce its judgment; and whether it is paid or not does not depend on the decision of either court, but upon the future action of the Secretary of the Treasury and of Congress.

And further, the Chief Justice said that the circumstance that one (the Court of Claims) is called a court and its decisions called judgments can not alter its character nor enlarge its power. (See also *District of Columbia* v. *Eslin*, 183 U. S., 62, 65; *District of Columbia* v. *Barnes*, 187 ib., 637.)

So, then, at the time of this so-called judgment, Barnes had no judgment at all. What then becomes of the doctrine of vested rights so earnestly and feelingly invoked by the learned counsel? If the appellee could have any such rights by virtue of the regular judgment of a court having jurisdiction to render such, it will hardly be contended this action of the Court of Claims was such a judgment. (*Calder* v. *Bull*, 3 Dall., 186.) If he had a judgment at all it was by virtue of the remedial provisions of the repealing act; and if that is so there can be no question as to right of appeal, if taken within the prescribed ninety days.

III.

BUT IF THIS IS A RETROSPECTIVE STATUTE, SUCH LEGISLATION IS WITHIN THE COMPETENCY OF CONGRESS.

I do not think it necessary, or proper even, to review the authorities cited by counsel for appellee, as bearing upon the legislative right to grant an appeal by way of review in cases like the one at bar. Those cases are either where the legislature attempted to directly grant an appeal or new trial in a cause between private citizens, or dispensing with a general law in favor of a particular case, or

passing a law in violation of the provisions of a State constitution.

The passage of a law affecting remedies in a court where permission to prosecute causes is based altogether upon the terms of special acts of Congress is another thing, and the authorities are not applicable.

As was said by Mr. Circuit Justice Miller in *Schenck* v. *Peay* (Wool., 175; Fed. Cas., No. 12451):

> The law concerning retrospective statutes has been so much discussed in this country and in England that it would be an affectation of learning to cite authorities upon the subject. It is undoubtedly within the power of Congress to pass retrospective statutes which do not come within the definition of ex post facto laws. As this prohibition of the Constitution relates exclusively to criminal laws, it does not affect the power of Congress to pass such a law in the matter before us.

And in *Stephens* v. *The Cherokee Nation* (174 U. S., 445, 477), Chief Justice Fuller, delivering the opinion of the court, said:

> The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain, and destructive of vested rights. By its terms the act was to operate retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective

operation, yet where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not render it necessarily void.

And while it is undoubtedly true that legislatures can not set aside the judgments of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. (*Calder* v. *Buel*, 3 Dall., 386; *Sampeyreac* v. *United States*, 7 Pet., 222; *Freeborn* v. *Smith*, 2 Wall., 160; *Garrison* v. *New York*, 21 Wall., 196; *Freeland* v. *Williams*, 131 U. S., 405; *Essex Public Road Board* v. *Skinkle*, 140 U. S., 334.)

This legislation interferes with no rights of the appellee. He went into the Court of Claims with full knowledge that an appeal to the Supreme Court was assured to both himself and the District. That right has never been taken away. At the most it can be said to have been only in abeyance.

ROBERT A. HOWARD,
Special Assistant U. S. Attorney.

L. A. PRADT,
Assistant Attorney-General.

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In the Supreme Court of the United States

October Term, 1902

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ELIAS E. BARNES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE DISTRICT OF COLUMBIA, APPELLANT,
v.
ELIAS E. BARNES. } No. 143.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

STATEMENT.

This case was brought in the Court of Claims on August 4, 1880, under the provisions of an act of Congress approved June 16, 1880 (21 Stat., 284), "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes."

On December 10, 1880, a general traverse was filed by the Attorney-General, and on January 26, 1882, a plea of set-off.

On March 31, 1883, by leave of the court, an amended petition was filed (Tr., p. 3). Upon this petition the several trials of this case have been had.

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This action is brought for compensation for work done and materials furnished under two contracts made by the claimant with the District of Columbia. These contracts were numbered, respectively, No. 264 and No. 413 in the series of contracts made by the board of public works of the District of Columbia, which contracts were in writing, duly made and signed, as required by the act of Congress of February 21, 1871, chapter 62, section 37 (16 Stat. L., 427).

Other contracts, which are styled "extensions" of the original contracts, were subsequently entered into, known as the first, second, and third extensions of contract No. 264, and the first, second, third, and fourth extensions of contract No. 413. (Tr. Findings I, VI, pp. 17–21; and Findings X, XI, pp. 24–27.) With these "extensions" we have little to do in this appeal. The accounts about which disputes have arisen grow out of the original contracts. Reference to the extensions is necessary, to show the enlargement of the subjects of the contracts and the differences in the prices agreed to be paid for like kinds of work in the original and the extended contracts. Really, however, the "extensions" were not *extensions* at all, but were new and independent contracts, with no connection with the original contracts, and having no resemblance except that they were made between the same parties.

By section 37 of the act of February 21, 1871 (supra), the board of public works was constituted, and it was provided:

> All contracts made by the said board of public works shall be in writing, and shall be signed

> by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District.

By "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874 (18 Stat. L., 116), the District government, including the board of public works, was abolished, and a government established to be exercised by a Commission, clothed with certain enumerated powers and authorities, and with these limitations (sec. 2):

> But said Commission, in the exercise of such power or authority, shall make no contract nor incur any obligation other than such contracts and obligations as may be necessary to the faithful administration of the valid laws enacted for the government of said District, to the execution of existing legal obligations and contracts, and to the protection or preservation of improvements existing or commenced and not completed at the time of the passage of this act.

In the original contracts the work to be done was described and the prices to be paid therefor specified: as the law required. In all of the "extensions" it was agreed the contractor should receive the prices established and paid by the board of public works for work of similar character. "The board was accustomed to fix prices for different kinds of work by making memoranda upon their records. These rates, which came to be known and familiarly called 'board rates,' to distinguish current and future rates from previous rates, were changed from time to time."

In directing attention to the claims in the petition and in the findings of the court, I shall particularize those only about which disputes have arisen. Reference will be made to the other items to show that where under the so-called "extensions" board rates, different from the rates specified in the original contracts were mentioned these board rates were allowed in every one of the trials of this case.

NORTH CAROLINA AVENUE.

The petition recites that under contract 264 and its extensions, and under orders from defendant's officers in connection therewith, claimant did work on North Carolina avenue. (Tr. Par. 111, p. 4.)

* * * * *

44,975 cubic yards grading (under board of public works), at 30 cents	$13,492.50
44,975 cubic yards hauled 868 feet over 200 feet, at 1¼ cents per yard per 100 feet	4,879.78
44,136.6 cubic yards grading (under Commissioners of the District of Columbia), at 30 cents	13,240.08
44,136.6 cubic yards hauled 1,550 feet over 200 feet, at 1¼ cents per yard per 100 feet	6,549.06
23,704 cubic yards clay excavation, at 30 cents additional	7,111.20

D STREET SE.

The petition further recites, in similar terms, claimant did work on this street. (Par. V, Tr., p. 5.)

* * * * *

3,060 cubic yards grading, at 40 cents per yard	$1,224.00
16,250 cubic yards grading, at 30 cents per yard	4,877.40
17,518 cubic yards haul, 2,400 feet over 200 feet, at 30 cents per yard	5,255.40

2,159 cubic yards grading, at 40 cents per square yard	$863.60
3,841 cubic yards grading, at 30 cents per square yard	1,152.30
6,000 cubic yards haul, 3,014 feet over 200 feet, at 37.68 cents per yard	2,260.80

(Sic.) (The errors in stating haul are apparent.)

THIRD STREET SE., CONTRACT 413.

The petition further recites, in similar terms, claimant did work on this street (Par. VIII, Tr., p. 6): but in it there is no claim for the *disputed* items, which were, however, included in the findings at each trial.

Much testimony was taken, both by depositions and by the presentation and deposit of papers in the custody of the Commissioners of the District of Columbia, applied for by the claimant according to the provisions of section **2** of the jurisdictional act (21 Stat. L., 285), between the filing of the original petition, August 4, 1880, and the allowance of the amended petition, March 31, 1883.

The case was then referred to a referee to take and state an account. Some further testimony was taken and transmitted to the referee, who made his report on May 5, 1885.

Exceptions to this report were filed by both claimant and defendant, and, after some further testimony on the part of claimant, and much delay and elaborate argument the case was finally submitted on March 29, 1887.

On October 31, 1887, the opinion and judgment of the court were announced, and with the findings of

facts filed. The judgment was for *defendants* in the sum of $11,074.11. (Tr., p. 8.)

The case is reported in full in 22 C. Cls. R., 366 *et seq.* The opinion and findings are in a transcript filed by the *District of Columbia, appellant*, v. *Barnes*, No. 400, October term, 1902, of this court (which is the same case as this), the appeal in which case was dismissed (187 U. S., 637). The appellant asks leave to refer to such transcript as a record of this court, and to the case reported in a series which has been repeatedly recognized by this court. It is necessary to advert to these findings, both for comparison and authority, in the consideration of the present appeal. The findings upon the disputed claims in the petition, hereinbefore set out, were as follows (22 C. Cls. R., 376, 378, 379):

(There are some clerical and typographical errors in these tables, but they are apparent, and do not affect the results.)

ON NORTH CAROLINA AVENUE.

13.	63,816 cubic yards excavation, 30	$19,144.80
14.	31,023 cubic yards haul, 1,155 feet over 200 feet, 14.4375 (error) prior to January 1, 1873, at 1 cent per 200 feet	1,791.50
15.	22,945¼ cubic yards haul, 865 feet over 200 feet, 10.85 (error) after January 1, 1873, at 1 cent per 200 feet	995.84
16.	9,848⅝ cubic yards haul, 590 feet over 200 feet, 7.375 (error) after January 1, 1873, 1 cent per 200 feet	290.54

ON D STREET SE.

2.	3,060 yards of grading, done under the original contract not extended, at 30 cents	$918.00
3.	2,159 yards of grading, old gravel street, done under the extension, at 40 cents	863.60
5.	17,518 yards haul, 2,400 feet over 200 feet, done after January 1, 1873, under the original contract not extended, at 1 cent per 200 feet	2,102.16
6.	5,472 yards haul, 2,400 feet over 200 feet, done under second and subsequent extensions of contract, at 1¼ cents per 100 feet	1,641.61

ON THIRD STREET SE.

22.	7,078 cubic yards grading, old gravel street, at 30	2,123.40
23.	29,326.83 cubic yards haul, 1,655 feet over 200 feet, at 1 cent per 200 feet over 200	2,425.38

Comparing the accounts and computations as stated in the petition and in the findings, these facts appear upon the several claims:

THE WORK ON NORTH CAROLINA AVENUE.

First. That all the work was done under contract No. 264.

Second. That the petition claimed for 89,111 cubic yards grading and excavation; the court allowed for only 63,816 cubic yards.

Third. That the petition claimed for all the haul at the rate of 1¼ cents per 100 feet (which was "board rates" after January 1, 1873), while the court allowed only one-half cent per 100 feet (which was the rate in the written contract).

Fourth. That the petition claimed an additional allowance of 30 cents per cubic yard on 23,704 yards

of excavation (grading), while the court disallowed this claim altogether.

THE WORK ON D STREET.

First. That the petition claimed for grading done under the original contract at 40 cents per yard (which was board rates after January 1, 1873), while the court allowed only 30 cents (which was the rate in the written contract).

Second. That the petition claimed for haul under the original contract at 1¼ cents per 100 feet, which was board rate after January 1, 1873, while the court allowed for this haul only 1 cent per 200 feet.

Third. That part of the work was done under the contract 264 and part under the "extensions," and that where the work was done under the "extensions," board rates were allowed.

THE WORK ON THIRD STREET.

First. That the disputed items were for work done under the original contract, and were allowed by the court at the rates stated in the contract.

Second. That, where work was done under the extensions, board rates were allowed.

The judgment of the court of October 31, 1887, was acquiesced in by the defendant; and, through all the perplexed proceedings thereafter, the defendant has persistently urged that those findings and judgment be sustained.

On November 18, 1887, the claimant filed a motion for a new trial.

This motion rested in the records of the court for over seven years and through seven terms of the court before any further attention was called to it.

On March 28, 1895, it was submitted to the court and on April 1, 1895, it was allowed. Such is the record.

But in the meantime the act of February 13, 1895 (28 Stat. L., 664), had been passed, by which the rates established and paid by the board of public works were directed to be allowed to claimant by the Court of Claims, and whenever such rates had not been allowed, the claimant was entitled to a new trial.

At this trial, after a reference and report of a referee, on November 11, 1895, the court adopted the report as its findings, and ordered that judgment be entered as follows:

> That the said Elias E. Barnes do have and recover in the manner provided by the act of June 16, 1880, chapter 243, and under the act of February 13, 1895, the sum of thirty-one thousand seven hundred and fifty-four 57/100 dollars ($31,754.57) upon debts of the District of Columbia, due and payable January 1, 1876, said amount to be divided and paid as follows: To Elias E. Barnes, twenty-two thousand three hundred and fifty 54/100 dollars ($22,350.54), and to Samuel J. Ritchie nine thousand four hundred and four 3/100 dollars ($9,404.03) (Tr., p. 9).

It is indisputable that this new trial was granted under the provisions of the act of 1895; and the findings and judgment of the court were expressly under

that act. The defendant then made a motion for a new trial, which was, on May 18, 1896, allowed. At the next term, on January 6 and 7, 1897, the case was argued and submitted; but before a decision, the act of 1895 was repealed by the act of March 3, 1897 (29 Stat. L., 665, 669). This statute provided that "all proceedings pending shall be vacated and no judgment heretofore rendered in pursuance of said act shall be paid."

The judgment of October 31, 1887, in favor of the District was thus left in force. But, although there is some confusion in the record, the case appears to have been treated as on a new trial allowed under the motion of claimant of November 18, 1887. Defendant is probably precluded from making any exception in this court. On the 19th day of December, 1901, and on the 14th, 15th, and 16th days of January, 1902, the case was again argued and submitted.

On March 31, 1902, the court filed its findings of facts and conclusions of law and entered judgment for the plaintiffs (Tr., pp. 17–38).

In the first finding is set forth contract No. 264, which was (the material part) to grade D street south from Fourth street east to New Jersey avenue, and North Carolina avenue from Fourth street east to New Jersey avenue.

The prices agreed upon are thus set forth in the tenth article of the contract (Tr., p. 19):

> It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials

and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two hundred (200) feet, and one cent additional per cubic yard for every two hundred (200) feet beyond the same.

(*I omit the other terms of the contract as not directly bearing upon the contentions here.*)

In this first finding was also this:

Prior to April 29, 1872, the board of public works of the District of Columbia had, by order entered on their records, fixed the price of certain work. * * *

For grading from and after January 22, 1872, the same prices as in the contract.

For grading old graveled streets to a depth of 2 feet, 40 cents per cubic yard.

And the finding is that the board awarded the contract at such rates and directed their clerk to so prepare it.

And by finding II (Tr., p. 19). That by mistake in the drafting of said contract the rate of 40 cents for grading old graveled streets to a depth of 2 feet was omitted therefrom; that said board of public works and said claimant, by mutual mistake, executed said contract without observing said omission.

Finding IV (Tr., p. 19) is that in September, 1873, the board increased the price for hauling to 1¼ cents

per cubic yard for 100 feet of hauling beyond the first 200 feet, and made said rate applicable to all work done after January 1, 1873.

The fifth finding (Tr., p. 20) is that in 1874 the board established a new grade for North Carolina avenue, and made a verbal agreement with said contractor that he should be paid board rates in certificates of the District for work done to conform to that grade.

In the sixth finding are set out the extensions, made in writing, to contract 264. In these extensions nothing is included of the grading and haul on North Carolina avenue or D street, which were provided for in the original contract. They were for new and different work, in the same localities and upon the same streets, and entered into between the same parties and performed during the progress of the work under 264. They provided that the work should be paid for at board rates and the work done under them was so paid for.

The seventh finding also states a verbal contract by which the claimant was to be paid increased rates over those of the contract.

The eighth finding states, subsequent to the execution of the contract the board had established, by payment to several contractors, the rate of 60 cents per cubic yard for stiff clay excavation.

The ninth finding (Tr., pp. 22, 23, 29) makes the account for the work done upon the disputed items as follows:

ON NORTH CAROLINA AVENUE.

13.	32,793 cubic yards excavation, per measure, August 9, 1872, at 30 cents, to establish grade	$9,837.90
14.	Haul on same, at one-half cent per 100 feet; 1,100 feet at 5½ cents	1,803.61
15.	20,438 cubic yards excavation, per measure, March 27, 1875, at 30 cents, between Coyle grade and new grade	6,131.40
16.	3,854 cubic yards, haul 300 feet, at 1¼ cents per 100 feet at 3¾ cents	144.52
17.	16,584 cubic yards, haul 1,100 feet, at 13¾ cents, at 1¼ cents per 100 feet	2,280.30
18.	10,585.6 cubic yards excavation, per measure, December 2, 1875, at 30 cents per cubic yard	3,175.68
19.	Haul on 10,585.6 cubic yards; 1,550 feet, at .1937 cent, at 1¼ cents per 100 feet	2,050.43
20.	33,550 cubic yards, excavation, per measure, January 22, 1876, at 30 cents per cubic yard, between Coyle grade and new grade	10,065.00
21.	Haul on 33,550 cubic yards, 1,550 feet, at .1937 cent, at 1¼ cents per 100 feet	6,498.63
26.	Additional on clay excavation, 23,704 cubic yards, at 30 cents (done after 1874)	7,111.20
27.	Excavation under sidewalks, viz, 10 inches depth under 4,086.70 square yards, brick pavement, 1,135.19 cubic yards, at 30 cents	340.55

ON D STREET SE.

2.	5,219 cubic yards excavation, at 40 cents, measure of December 14, 1876, between Second and Sixth streets	2,087.60
4.	Haul of 2,238 cubic yards excavation between original surface and established grade, 2,358 feet, at one-half cent per 100 feet, .1179 cent	263.86
5.	Haul of 20,752 cubic yards excavation between established grade and new grade, 2,358 feet, at 1¼ cents per 100 feet, .2947 cent, (as per agreement with the Commissioners)	6,115.61

ON THIRD STREET.

23.	7,078 cubic yards haul, 1,655 feet over 200 feet, at one-half cent, .0827 cent	$585.35
24.	22,248.83 cubic yards haul, 1,655 feet over 200 feet, at 1¼ cent, .2068 cent	4,601.05

These findings differ from the claims of the petition on North Carolina avenue, in that they allow for a much larger amount of excavation and haul than was claimed in the petition.

They differ from the findings in the reported case most materially, in that they allow for a much larger amount of excavation on North Carolina avenue; and for rates for excavation and haul increased over the rates specified in the contracts, as is shown in the comparative tables herein referred to.

Judgment was entered for claimant for $23,694.47, due and payable March 1, 1876. (Tr., p. 38.)

From this judgment an appeal was allowed on June 26, 1902. On December 8, 1902, this appeal was dismissed in the Supreme Court (187 U. S., 638).

The statute, under the provisions of which the court had refused to take jurisdiction of the appeal, having been repealed (31 Stat. L., 572) on October 26, 1903, this present appeal was allowed by the Court of Claims. (Tr., pp. 39, 40.) The repealing statute provided, "from all final judgments or decrees heretofore rendered in suits of the character of those mentioned in said proviso an appeal shall be allowed to the Supreme Court of the United States at any time within ninety days after the passage of this act."

ASSIGNMENT OF ERRORS.

I. The court erred in deciding as a conclusion of law that contract 264 be re-formed so as to incorporate therein the rate of 40 cents per cubic yard for old gravel streets to a depth of 2 feet, to conform to the intention of the parties as set forth in finding 2.

II. The court erred in allowing the item (26) in the account of work on North Carolina avenue (Finding IX, Tr., p. 22) for additional stiff clay excavation, as under a rate established by payment to several contractors, the same being different from the contract rate (Finding VIII); and as being agreed upon by verbal contract (Finding IX).

III. The court erred in holding that the contractor was entitled to recover rates different from and larger than those specified in the written contracts, by reason of memoranda or orders entered on their records by the board of public works. (Findings I, IV, VIII.)

IV. The court erred in holding and deciding that the Commissioners of the District had the authority to make verbal agreements and understandings with the claimant, that he should be paid greater rates for work done under his written contract than those specified in the written contract. (Finding V.)

V. The court erred in allowing, in the several accounts for work done on North Carolina avenue, D street SE., and Third street SE., the items of excavation or grading, at 40 cents per cubic yard, when the contract price was 30 cents per cubic yard. (Contracts, pp. 17 and 24, and accounts Finding IX, Tr., p. 22, and Finding XII, Tr., p. 29.)

VI. The court erred in allowing for excavation or grading on North Carolina avenue a much greater amount than was claimed in the petition in the case. (Finding IX, Tr., p. 22, and petition, Tr., p. 3.)

VII. The court erred in allowing on the several streets 1¼ cents per cubic yard for every 100 feet of excavation hauled beyond the first 200 feet, when the contract price was 1 cent for every 200 feet hauled beyond the first 200 feet. (Contract 264, Finding I; contract 413, Finding X and accounts in Findings IX, Tr., p. 22, and XII, Tr., p. 28.)

VIII. The court erred in re-forming the contracts so as to allow these additional rates.

IX. The court erred in deciding that the contractor was entitled to receive rates greater than those stipulated in the written contracts, by understandings and agreements verbally made by and between the contractor and the Commissioners of the District of Columbia, as stated in Finding V (Tr., p. 20) and Finding VII (Tr., p. 21).

X. The court erred in determining as follows (Tr., p. 37):

"In the present case there does not appear to have been, in terms, a revival of the written contracts, but the verbal agreements on the part of the Commissioners of the District were that for the new or additional work done by the claimant he should be paid the rates therefor established and paid by the board of public works, so that whether the work be regarded as having been done under the contracts as revived or under the verbal agreement of the Commissioners, as set forth in

findings, the claimant, in either event, is entitled, under the provisions of the act of 1880, to the benefit of the rates so established and promised to be paid for the new or additional work performed by him.

XI. The court erred in deciding, as a conclusion of law (Tr., p. 32), that the claimant was entitled to be allowed on findings 9, 12, 13, 14, and 15 the sum of $238,781.94, less the sum of $202,047.68 heretofore paid said claimant, leaving a balance in his favor of $36,734.60.

ARGUMENT.

I.

THE MOTION TO DISMISS THE APPEAL.

This motion is based upon the contention that a so-styled judgment rendered in this case on the 31st day of March, 1902, was a final judgment by which the rights of the claimant became vested, and that a right of appeal subsequently conferred was invalid because destructive of those vested rights.

This contention, when viewed in the light of the circumstances of the litigation of this claim, is not supported by the reasoning or authorities cited in the brief of the appellee.

It is expressly provided in the act of 1880, the act under which this suit was brought, section 1, "the court shall have the same power, proceed in the same manner, and be governed by the same rules in respect to the mode of hearing, adjudication, and determination of said claims as it now has in relation to the adjudication of claims against the United States."

By the second section the right of appeal was assured to both the District of Columbia and the claimant, subject to the same rules and regulations as are prescribed by law for appeals in cases against the United States.

By the third section it is provided that the Attorney-General of the United States shall have authority to defend the District of Columbia against the claims prosecuted in the Court of Claims and on appeal, as in cases against the United States.

This was the law under which this claim was prosecuted until the proviso in the act of June 6, 1900 (31 Stat. L., 572), "no judgment * * * shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by, Congress." On account of this enactment the appeal taken from the "judgment" of the Court of Claims was dismissed. The judgment was rendered afterwards.

But this proviso did not repeal, even by implication, the appellate provisions of the act of 1880. Even if it did, however, there was no solemn judgment of a court which vested rights in the claimant. There was no finality in this action of the court. As was said by Mr. Chief Justice Taney, in the opinion ordered to be embodied in Appendix 117 U. S., 696, "neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place to decide whether he will include it in his estimates of private claims, and if he should decide in

favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment."

And in the case of *District of Columbia* v. *Eslin* (183 U. S., 62, 65), Mr. Justice Harlan, delivering the opinion of the court, said:

> * * * What was said by Chief Justice Taney in *Gordon* v. *United States* (117 U. S., 697, 702), may be here repeated. After stating that this court should not express an opinion where its judgment would not be final and conclusive upon the rights of the parties, and that it was an essential part of every judgment passed by a court exercising judicial power that it should have authority to enforce it, or to give effect to it, the chief justice said: "It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of Congress.

The inevitable conclusion is that this judgment for Barnes was in none of its characteristics a judgment, nor was it similar to the judgments cited by counsel for appellees.

This proviso was repealed by an amendment in the general deficiency bill March 3, 1903 (32 Stat. L., 1070), and the provisions for appeal in the statute of 1880 practically reenacted; "and from all final judgments or decrees heretofore rendered in suits of the character of those mentioned in said proviso an appeal shall be allowed to the Supreme Court of the United States within ninety days after the passage of this act, except in cases where the amounts found due by said court have been paid at the Treasury."

This is the exact language of the clause of the statute repealing the obnoxious provisions of the organic act of 1863. (14 Stat. L., 9.) The second rule of the Supreme Court in reference to appeals from the Court of Claims is, "that in all cases in which judgments or decrees have hertofore been rendered, where either party is by law entitled to an appeal:" following the statute.

This power in Congress over the whole subject-matter of courts and their procedure, in cases against the Government, is complete. There is "no doubt of the power of the legislative body to define the terms on which the judgment may be rendered against the Government as to classes of cases or as to individual cases." (*De Groot* v. *United States*, 5 Wall., 419, 433.)

All this legislation depends upon this power. If this judgment was final, and a contract, and there were vested rights by reason of it, how can the law forbidding its payment, until reported to the Secretary and specific authority for its payment granted by Con-

gress, be sustained? Manifestly this was a thing *in fieri*, an expression, an opinion of a commission—a board of examination. If the repeal of the proviso gave it the form and substance of a judgment of a court, then it had no vigor of execution until the exhaustion or destruction of the right of appeal. There is no uncertainty as to the intention of Congress in these several enactments. The effect of the proviso of 1900 was to put the action of the Court of Claims in these cases upon the same plane as cases referred to them under the Bowman and Tucker acts, where they transmit their findings to Congress. The circumstance that the court calls its decisions judgments, as Mr. Chief Justice Taney said in *Gordon* v. *United States* (*supra*), can not alter its character nor enlarge its power.

How then can this enactment be brought within any objections to retrospective enactments? Was any right of this claimant injuriously affected by this remedial legislation, for such it was? Rather, under the whole theory of the organization of the Court of Claims, was he not in a better position, by reason of this later statute, to establish honest and substantial obligations? And, after all, is not that one of the surest tests of the validity of retrospective laws?

To shorten this brief, I ask leave to refer the court, in addition to what I have said here, to the brief heretofore filed in opposition to the motion to dismiss.

II.

NO GENERAL EQUITY JURISDICITON WAS CONFERRED UPON THE COURT OF CLAIMS BY THE ORIGINAL ORGANIC ACTS.

The Court of Claims owes its establishment, primarily, to the accumulation of large numbers of private claims against the Government presented to Congress. "It was established," says Mr. Chief Justice Chase, in *Klein's case* (13 Wall., 128), "for the triple purpose of relieving Congress, and of protecting the Government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims."

It is one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the Government and the citizen. "If, therefore, the Court of Claims has the right to entertain jurisdiction of cases in which the United States is defendant, and to render judgment against that defendant, it is only by virtue of acts of Congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to parties and to the cause of action, as Congress has prescribed." (*De Groot* v. *United States*, 5 Wall., 419, 431.)

The creative act was passed February 24, 1855 (10 Stat. at L., 612). By it a court was established with authority "to hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States which may be suggested to it by a petition filed

therein; and also all claims which may be referred to it by either House of Congress."

It was enacted, section 7, that at stated times the court should report to Congress the cases upon which they had finally acted, stating the material facts, with their opinion, etc., for the action of Congress.

The uncertainties and judicial embarrassments, attendant upon this mode of procedure, caused the act of 1863 (12 Stat. at L., 765), which conferred, generally, the same jurisdiction, but also jurisdiction (sec. 2) of "all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatever on the part of the Government against any person making claims against the Government in said court."

It has been uniformly decided in this court that the causes of action under these statutes are claims for the satisfaction of which a money judgment may be given. The question was directly presented in *United States* v. *Alire* (6 Wall., 573). The petitioner brought suit in the Court of Claims, praying that a bounty land warrant be made and delivered to him.

Mr. Justice Nelson, delivering the opinion of the court, said:

> It will be seen by reference to the two acts of Congress on this subject, that the only judgments which the Court of Claims are authorized to render against the Government, or over which the Supreme Court have any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is

made, are judgments for money found due from the Government to the petitioner. And although it is true that the subject-matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the Government.

* * * * *

Even if the first section of the act of 1855 and the second of 1863 could be construed as giving a jurisdiction in cases other than money demands against the Government, no judgment could be rendered by the court below, and, of consequence, the carrying into effect their finding must depend on the act of 1855. But we are of opinion that it was intended by the several provisions of the act of 1863 that the cases to be heard were to pass into a judgment as prescribed in the seventh section of the latter act, and hence they must be such in their nature and character as may admit of a judgment or decree in conformity with its provisions.

In *Case* v. *Terrell* (11 Wall., 199, 201) Mr. Justice Miller speaks of "moneyed judgments" as being peculiarly the subject of this jurisdiction.

In *Bonner* v. *United States* (9 Wall., 156), which was a suit for compensation for lands ceded for claimant's benefit by virtue of his holding a military land warrant, on the allegation that the Government had wrongfully

appropriated to other uses the lands, the court uses the following language:

> If this position (the claimant's) be correct, this claim is based on the theory that the United States has violated the trust contained in the deed of cession of the Northwestern Territory, and is bound in good conscience to furnish compensation to the Virginia beneficiaries who suffer by this misconduct. This makes a case for the interposition of a court of equity, and if it were a controversy between two private suitors, it would have to be settled there, for a court of law could not afford the proper mode and measure of relief. But the Court of Claims has no equitable jurisdiction given it, and was not created to inquire into rights in equity set up by claimants against the United States. Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them.
>
> * * * * *
>
> It is only a contract authorized by law that the Court of Claims can consider, and as there is no law of Congress on this subject there is nothing on which that court could base a judgment against the United States if, in the opinion of that tribunal, it had not fulfilled its duties toward the beneficiaries under the Virginia deed of cession. The liability of the Government, if at all, arises out of the breach of an accepted trust, and that liability can not be enforced at law. The claimant is in no better position because the Government is the trustee than he would be if a private person occupied

> that relation, and it is very clear, if such were the case, that a court of equity would alone have the power to deal with him.

For the same reason the jurisdiction did not extend to claims in admiralty, or for the enforcement of liens, which are generally prosecuted by proceedings *in rem*.

III.

NEITHER WAS GENERAL EQUITY JURISDICTION CONFERRED BY THE ACT OF MARCH 3, 1887 (24 STAT. AT L. 505).

By the first section of this act it is provided:

> That the Court of Claims shall have jurisdiction of all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable.
>
> * * * * *
>
> All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court.

The second section provides for the concurrent jurisdiction, limited as to amount claimed, in the district and circuit courts.

The fifth section prescribes the mode of procedure. It requires the petitioner to set forth "the nature of his claim" and the facts "upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and the law."

The language "the money or other thing claimed" in this section does not imply that the suit may be for a thing, but against it. As the jurisdiction was extended to equitable and admiralty claims by the first section, and as in equity or admiralty the claim might be of such a character that it could be enforced only by a suit against the thing, which would be the thing claimed, it was necessary in the procedure to use that word as well as the words *money* and *damages*. In admiralty, the property of the United States might be subject to a lien for salvage, or other maritime lien. Proceedings to enforce such a lien would be *in rem*, and in such cases the right would exist notwithstanding the ownership of the thing by the United States. But there was no remedy to enforce it, because of the exemption of the Government from suit. In *Briggs* v. *Boats* (11 Allen, 157) it was ruled that the right existed, but that there was no remedy after the boats had passed into the ownership and possession of the Government.

Or possibly, a view might be taken that if the United States should purchase a piece of land, against which a mortgage lien existed prior to the purchase, a bill in

equity might be filed to foreclose. But even then the decree could only be for the money claimed.

But, conceding for the purposes of the argument, that the words *anything claimed* were necessary to include all the claims embraced in the first section of this act, that does not support the inference that all equitable and maritime powers were intended to be embraced in the jurisdiction. Mr. Justice Bradley, in speaking of this very clause, in a case we will hereafter advert to, said: "It is one of those general expressions which must be restrained by the more special and definite indications of intention furnished by the context." (*United States* v. *Carrie Jones*, 131 U. S., 1, 19.)

The tenth section provides that no appeal or writ of error shall be allowed after six months from the judgment or decree; and that from the date of the final judgment or decree, interest shall be computed thereon at the rate of 4 per cent per annum, until the time when an appropriation is made for the payment of the judgment or decree. This shows that whatever was the judgment or decree it was to be satisfied by payment of money, and that interest was to be collected on the amount. The judgments or decrees must be for money in all cases. This excludes the idea of general jurisdiction.

Besides, if Congress had intended to confer this jurisdiction on the Court of Claims in all matters in dispute in which the United States was a party in interest it would have said so, as has been said in other jurisdictional legislation, as:

> The circuit courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature, at common law or equity, where the *matter in dispute*, exclusive of costs, exceeds the sum or value of five hundred dollars.
>
> Second. Of all suits in equity where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners. (Rev. Stat., sec. 629.)

IV.

NOR WAS ANY GENERAL EQUITY JURISDICTION CONFERRED UPON THE COURT OF CLAIMS BY THE ACT OF MARCH 3, 1880 (21 STAT. AT L., 284), EXTENDING JURISDICTION TO CLAIMS AGAINST THE DISTRICT OF COLUMBIA.

By the first section of this act it is provided:

> That the jurisdiction of the Court of Claims is hereby extended to, and it shall have original legal and equitable jurisdiction of, all claims now existing against the District of Columbia arising out of contracts, made by the late board of public works and extensions thereof made by the Commissioners of the District of Columbia. * * *

By a mere cursory reading of this act it is manifest the intention of Congress was to assimilate it with the statutes of the original jurisdiction of the court in suits wherein the United States was a party in interest. In truth, in all the jurisdictional statutes, the well-considered design was kept in view to bring into conformity

the jurisdiction and procedure of the court, whatever might be the subject-matter upon which it was exercised.

To be sure, the act of 1887, which we have been considering, was passed long subsequent to the act of 1880, under which the present suit is brought. What I propose to show is that all these statutes are identical in their incidents and characteristics. And if we were to omit from the comparison the act of 1887, still the acts of 1855 and 1863 would remain as trail markers for all following legislation.

The words "legal and equitable jurisdiction" in the first section appear to be regarded by the Court of Claims as conferring general equity jurisdiction. It is insisted by the appellant that the context precludes any such conclusion. If, as I have said before, Congress had intended this broad jurisdiction in equity, it would have used the language it always used in conferring such jurisdiction. The word *equitable* has here its ordinary signification—"marked by a due consideration of what is fair, unbiased, and impartial." It is not to be understood as referred to the technical definition of the powers of a court of chancery. We find many such uses of this and similar words. They may not be the words of designation of equity jurisdiction, when that jurisdiction is being conferred. Other appropriate and accustomed words are used for that purpose.

Now, there have been cases which, by the language of the acts, were to be conducted according to the rules of equity. Such are the familiar cases brought

under the statutes providing for the settlement and confirmation of private land titles in Florida, etc. By these rules were meant the well-settled usages and principles of the court of chancery as adopted and recognized in their decisions, which have been acted on here, under the provisions of the Constitution and the acts of Congress. (*United States* v. *Arredondo*, 6 Pet., 691, 709.)

Thus also in cases like *United States* v. *Lyndes' Heirs* (11 Wall., 632), which was the question of the confirmation of a title by grant, *according to the principles of equity and justice*, it was said that the probable meaning was that *if it should appear* that a grant was obtained by fraud, or was affected by any other special vice, it would be the duty of the tribunals to reject it. How different the requirement of these statutes! How definite the mandate to the officers or court!

Restraining this general term, in the light of the context of this and similar statutes of jurisdictional legislation, enough efficacy can be given the language by a no means strained construction. It is not uncommon for legislators, out of caution, to embrace in a statute a sort of amplifying words, but which are intended merely to invoke or warrant a liberal construction. The word we are speaking of receives a fair meaning if we apply this test. And more strongly still, if we refer to the third section: "The Attorney-General of the United States shall * * * defend * * * with the same power to interpose counterclaims and offsets against claims and defenses for fraud practiced

or attempted as in claims against the United States." These were matters originally of equitable jurisdiction, and so were other matters of defense mentioned.

As, in *Gaines* v. *Miller* (111 U. S., 395), a demurrer to a bill in equity was sustained, the court deciding that the action was simply a case of money had and received for the use of the complainant, and a declaration in assumpsit in the common counts would have fully stated the complainant's cause of action.

In *Wallis* v. *Shelly* (30 Fed. R.) the court said: "Although an action for money had and received is frequently called an 'equitable action' by the authorities, courts of equity refuse jurisdiction, in the absence of special circumstances, because the remedy at law is adequate and complete." And yet these cases, originally, were cases upon *equitable considerations.*

Moreover, this "equitable" jurisdiction is confined to *claims* in this statute as well as the other statutes of jurisdiction in the Court of Claims, or courts having concurrent jurisdiction.

The extended jurisdiction conferred by the act of 1887 is broader than that in the District of Columbia act. The language is "in respect of which claim the party will be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."

In the case of *United States* v. *Carrie Jones* (131 U. S., 1) Mr. Justice Bradley, in delivering the opinion of the court, speaking of this latter act, said:

> "Claims" redressible "in a court of law," equity, or admiralty, may be claims for money

only, or they may be claims for property or specific relief, according as the context of the statute may require or allow. The claims referred to in the original statute of 1855, as described in the first section thereof, above quoted, might have included claims for other things besides money; but various provisions of that act and of the act of March 3, 1863, were inconsistent with the enforcement of any claims under the law except claims for money. Thus in the fifth section of the act of 1863 the right of appeal was limited to cases in which the amount in controversy exceeded $3,000, and in the seventh section it was provided that if judgment should be given in favor of the claimant the *sum* due thereby should be paid out of any general appropriation made by law for the payment of private claims; and if a judgment was affirmed on appeal interest was to be allowed thereon, etc. * * *

The sections of the act of 1863 referred to in this opinion are still in force, not being repealed by the act of 1887, which only repeals "all laws and parts of laws inconsistent" therewith. Section 5, relating to appeals, is transferred to section 707 of the Revised Statutes, giving an appeal to this court "where the amount in controversy exceeds $3,000;" and section 7, relating to the mode of paying judgments out of a general appropriation, and allowing interest where a judgment is affirmed, is contained in sections 1089, 1090 of the Revised Statutes. These sections are still the law on the subjects to which they relate, being necessary to the completion of the

system, and not being supplied by any other enactments. Indeed, they are expressly retained. The fourth section of the act of 1887 declares: "The jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act," and the ninth section declares "that the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained." These provisions undoubtedly include the Court of Claims as well as the district and circuit courts. So, in relation to interest, section 10 declares that "from the date of such final judgment or decree interest shall be computed thereon, at the rate of four per cent per annum, until the time when an appropriation is made for the payment of the judgment or decree." It seems, therefore, that in the point of providing only for money decrees and money judgments the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands. We do not think that it was the intention of Congress to go further than this. Had it been, some provision would have been made for carrying into execution decrees for specific performance, or for delivering the possession of property recovered in kind. The

> general scope and purport of the act is against any further extension than that here indicated. The expression in the fifth section referring to "money or any other thing claimed, or damages sought to be recovered," on which so much reliance is placed by the appellees, can not outweigh the considerations referred to, and operate to introduce entirely new fields of jurisdiction. * * *

All through this discussion it is to be borne in mind that the claims against the District of Columbia are, as well, claims against the United States, because the indebtednesses out of which they arose were indebtednesses, a moiety against each. (18 Stat. L., 120; Ib., 332; 19 Ib., 211; 20 Ib., 102, 104, 105; *District of Columbia* v. *Johnson*, 165 U. S., 330, 332.)

The modes of procedure in all these acts were substantially the same; and the character of the jurisdiction applies with similar force to all.

We have referred to the acts of 1863 and 1887. Let us notice the resemblances in the act of 1880.

By the first section of that act (*supra*) said Court of Claims shall have the same power, proceed in the same manner, and be governed by the same rules, in respect to the mode of hearing, adjudication, and determination of said claims, as it now has in relation to the adjudication of claims against the United States.

By the second section: All such claims against the District of Columbia shall, in the first instance, be prosecuted before the Court of Claims by the claimant, his personal representative, or his assignee, in the same manner, and subject to the same rules, so far as

applicable, as claims against the United States are prosecuted therein.

By section 3, the Attorney-General of the United States shall have authority, and it shall be his duty, to defend the District of Columbia against all such claims against the District of Columbia, prosecuted in said Court of Claims, and on appeal in like manner as he is now by law required to defend the United States in said court, with the same power to interpose counter claims and offsets against said claim, and defenses for fraud practiced or attempted, and all other legal defenses, and with like power of appeal, as in cases against the United States tried in said court.

By section 4, all laws now in force relating to prosecutions of claims against the United States in the Court of Claims shall apply, as far as applicable, to the prosecution, practice, hearing, and determination of claims against the District of Columbia, authorized to be prosecuted under the provisions of this act.

By section 5 it is provided that the sums due in cases of final judgment shall be paid by the Secretary of the Treasury, which payment, by section 6, is made in the 3–65 bonds authorized by the act of Congress of June 20, 1874.

It seems clear that the reasoning of the cases construing the acts of 1863 and 1887 applies with equal force to the construction of the act of 1880. Indeed, the construction of the latter act is circumscribed by narrower bounds, in that the claims to be adjudicated are of a limited class and regulated by well-defined principles of statutory law

V.

AND, IF ANY EQUITY JURISDICTION WAS CONFERRED UPON THE COURT OF CLAIMS, UNDER THE STATUTE OF MARCH 3, 1880, THAT JURISDICTION CAN BE EXERCISED ONLY IN THE MANNER PRESCRIBED FOR ASCERTAINING EQUITABLE RIGHTS AND ADMINISTERING EQUITABLE REMEDIES IN THE COURTS OF THE UNITED STATES.

The granted jurisdiction is *original* equitable jurisdiction: jurisdiction in the first instance. If the claim which a party has is redressible only in a court of equity he must proceed by bill in equity. And in any court of the United States, even if the subject-matter is auxiliary or assisting, the redress can not be afforded in a suit at law if that subject-matter is the object of equity jurisdiction.

This distinction between common law and equity jurisdiction was carefully discussed by Mr. Justice Daniel in delivering the opinion in *Fenn* v. *Holme* (21 How., 481, 484, 485, 486). That learned justice said:

> In the act of Congress "to establish the judicial courts of the United States" this distribution of law and equity powers is frequently referred to, and by the sixteenth section of that act, as if to place the distinction between those powers beyond misapprehension, it is provided "that suits in equity shall not be maintained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," at the same time affirming and separating the two classes or sources of

judicial authority. In every instance in which this court has expounded the phrases proceedings at the common law and proceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal, and the latter as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the court of chancery in England.

* * * * *

In the case of *Parsons* v. *Bedford et al.* (3 Peters, 446, 447), this court, in speaking of the seventh amendment of the Constitution, and of the state of public sentiment which demanded and produced that amendment, say:

"The Constitution had declared, in the third article, that the judicial power shall extend to all cases *in law and equity* arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, etc. It is well known that in civil suits, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that the distinction was present in the minds of the framers of the amendment. By *common law* they meant what

the Constitution denominated in the third article LAW; not merely *suits* which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where *equitable rights* alone were recognized and equitable remedies administered."

The same doctrine is recognized in the case of *Strother* v. *Lucas* (6 Peters, 768, 769), and in the case of *Parish* v. *Ellis* (16 Peters, 453, 454).

In *Bennett* v. *Butterworth* (11 How., 669, 674, 675) this court said:

"The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity, and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But if the claim be an equitable one, he must proceed according to the rules which this court has prescribed, regulating proceedings in equity in the courts of the United States."

And in *Krippendorf* v. *Hyde* (110 U. S., 276, 284), this court, by Mr. Justice Matthews, said:

This court has uniformly resisted the tendency to confuse the boundaries of law and equity in its procedure, and maintained the distinction between the two systems, so deeply imbedded in our jurisprudence; and in the present instance is not to be considered as departing from the consistent course of precedents in which that distinction has been main-

> tained. The bill in this case is not to be treated as an original bill in equity, for as such it could not be maintained.

Van Norden v. *Morton* (99 U. S., 378) was a bill in equity in the United States circuit court for the district of Louisiana, where a marshal had seized a dredge boat under an execution, and the complainant alleged that he was the owner of the boat, that it was not liable to be taken on execution, that the seizure had subjected him to loss, and the continued deprivation of its use would cause him much greater loss. A temporary injunction was granted, and on hearing the bill was dismissed on its merits. On appeal the bill was ordered dismissed for want of jurisdiction. In delivering the opinion of the court, Mr. Justice Miller said:

> We think the rule is settled in this cause that whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent upon State statutes or acts of Congress, the jurisdiction of such cases as between the law side and the equity side of a Federal court must be determined by the essential character of the case, and unless it comes within some of the recognized heads of equitable jurisdiction it must be held to belong to the other.

The learned judge then refers to *Thompson* v. *Railroad Co.* (6 Wall., 134), in which this court said:

> The remedies in the courts of the United States are at common law or in equity, not according to the practice of the State courts, but according to the principles of common law and

> equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And, although the forms of proceedings and practice in the State courts shall have been adopted in the circuit courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit, citing *Robinson* v. *Campbell* (3 Wheat., 212); and *Bennett* v. *Butterworth* (11 How., 669), to which we take leave to add *Jones et al.* v. *McMasters* (20 Id., 8), and *Basey* v. *Gallagher* (20 Wall., 680).

Most of the errors assigned in this case go to the reformation of contracts 264 and 413, so as to allow increased rates for excavation and haul for work done on the different streets.

The first conclusion of law (Tr., p. 32) decides that contract 264 be *reformed* by incorporating a rate of 40 cents per cubic yard for old gravelled streets, and this rate is carried into the account allowed on D street. (Tr., p. 23.)

Other changes in the contracts amount to reformations, and are referred to in detail in my statement.

The reformation of written contracts is peculiarly a ground of equitable jurisdiction. That this power exists is too well settled to be disputed; but it is a power in courts of equity alone. Mr. Justice Story, in his work on Equity Jurisprudence, says, section 164*d*:

> The court will not re-form a deed on petition

> or motion, but only upon regular bill for that purpose, wherein the proposed alteration is distinctly set forth; and until the deed is re-formed the court is bound to act upon it as it exists, although fully satisfied that it is at variance with the intention of the parties.

In *Walden* v. *Skinner* (101 U. S., 577, 583), this court, speaking by Mr. Justice Clifford, states the rule:

> Courts of equity afford relief in case of mistake of facts, and allow parol evidence to vary and re-form written contracts and instruments, when the defect or error arises from accident or misconception, as properly forming an exception to the general rule which excludes parol testimony offered to vary or contradict written instruments.

In *Union Mutual Life Ins. Co.* v. *Mowry* (96 U. S., 544), Mr. Justice Field, delivering the opinion of the court, said:

> If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and the insurance company.

These authorities apply, peculiarly, to the first error assigned. But they are also of force in considering the second, fifth, seventh, and eighth assignments of error, directed to the action of the court below in

reforming the contract in the matter of the "stiff clay" excavation, and in reforming the contract so as to incorporate in it after established rates of haul.

The contract No. 264 was "to grade North Carolina avenue from Fourth street east to New Jersey avenue." By the fourth paragraph of the contract it was agreed that the party of the first part may, on notice to the party of the second part, suspend work under this contract. By the sixth paragraph it was agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same * * * shall be sustained by the contractor. And in the tenth article it was agreed that the contractor should receive the prices mentioned as full compensation for furnishing all the materials and labor which might be required in the prosecution of the whole of the work to be done under the agreement. "Stiff clay" excavation is not mentioned, but excavation of "earth, sand, or gravel."

In Finding IX is stated, "under said contract No. 264 and the extensions thereof, as reformed by the insertion of the omitted rate for old gravel streets and the additional for clay excavation * * *." It is true that the learned judge who delivered the opinion of the Court of Claims speaks also of this work having been done by verbal agreement with the Commissioners. But the pleadings in the case allege, and all the accounts from the very beginning show and claim, that this work was done under contract 264. I allude to it

at this time under this claim for reformation of the contract. And so, also, of the claim for the additional amount of haul. If the work was done under the contracts, as is stated in the petition and findings, the parties are bound and limited to the prices in the written contract. If the understanding, before the contract was executed, was that the parties were to receive prices as arranged and established by the board of public works during the continuance of the work, and it was sought to reform the contract to show this mistake, this could only be done in the manner indicated by the authorities above cited.

VI.

THERE WAS NO AUTHORITY IN THE BOARD OF PUBLIC WORKS OR THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA, BY MEMORANDA ON THEIR JOURNALS OR BY VERBAL AGREEMENTS, TO CHANGE THE CONTRACTS MADE UNDER EXISTING LAW.

These contracts were entered into under the act of February 21, 1871 (16 Stat. L., 427), which, as we have seen, required all contracts to be in writing and forbade the allowance of extra compensation for work done under a contract.

The errors assigned by appellant are directed toward the allowance by the court below of items in the several accounts which were not embraced in the written contracts.

These items had been rejected by the court at a previous trial of the case. That matter is thus alluded

to by the learned judge delivering the opinion in the case under review:

> We have thus stated the differences between the findings heretofore filed and the findings now filed.

It is for this reason that, with great respect, I urge upon this court that the former findings and judgment of the court were correct.

1. As to the increased amount of excavation on North Carolina avenue, the findings are for 97,336.6 cubic yards. The finding of the court before was for 63,816 cubic yards. I do not claim to go behind this finding of facts, but, as the petition only claims 89,112 cubic yards, I submit the claimant can not recover a greater amount than thus claimed.

2. As to the increased price for excavating graveled streets, in the opinion at the former trial, Mr. Chief Justice Richardson said (22 Ct. Cls. R., 389):

> It appears that on September 14, 1871, the board, by a memorandum on their records, fixed the price of grading at 20 cents per cubic yard, and twelve days later—September 26—probably before any contracts were signed, they resolved that the price did not apply to old graveled streets ordered to be cut down, but that they would allow 40 cents for such grading and "that the chief of the bureau of contracts be notified of this action." It is to be presumed that the contract clerk thereafter, as was his duty, made out all contracts according to that resolution until January 22, 1872, when the board entered of record another order.

They then ordered "that the prices of grading be fixed from and after this date at 30 cents per cubic yard," thus taking a mean between the two former prices of 20 and 40 cents, and fixing one uniform rate for all grading at 30 cents per cubic yard.

The claimant's two contracts were made subsequently to the latter date, in the months of April and July then next following, and they conform, as to the price of grading, to the then most recent order of 30 cents per cubic yard. Had any different rate for different kinds of grading been intended they should have, and no doubt would have, been set out in the formal written contracts, since those contracts specified exactly what streets were to be graded at 30 cents per cubic yard, and both parties knew whether any portion of them were old graveled streets or not, and yet made no exception.

In our opinion, the claimant is bound by his contracts at 30 cents per cubic yard for all grading which he did under them, and can not hold the District to pay 40 cents a cubic yard under a preexisting order of the board of public works not reduced to writing and signed by the parties according to law.

3. As to the "stiff-clay" excavation.

This item (26 Finding IX; Tr., p. 22) $7,111.20 was an additional 30 cents over the price of 30 cents allowed in the contract. At the former trial the judge delivering the opinion of the court said in reference to this claim (22 Ct. Cls. R., 389, 340):

There is still another claim for the excavation of "stiff clay," which occurred on North Carolina

avenue. By his contract, No. 264, said Barnes agreed to grade that street, and the only compensation agreed upon was "30 cents for each and every cubic yard of earth, sand, or gravel excavated." Under that agreement he excavated 63,816 yards, of which about one-third was "stiff clay."

Whether or not "stiff clay" properly comes within the terms "earth, sand, or gravel," in all connections, we think the contractor is not entitled to extra pay for excavating it in this case. The grading of a particular street was the work contracted for, and not the removal of "earth, sand, and gravel," and the clay found in the material excavated was incidental to the work, and intended, as it seems to us, to be covered by the price agreed upon per yard. The contractor excavated the whole under his contract without objecting and without notice to the other party that he claimed that any of the work was not embraced in his contract price, and that he should demand extra pay for "stiff clay," until the whole was completed. This, we think, was an acquiescence in the construction that the contract price per yard covered the whole work, as claimed by the defendant and their officers.

This was exactly the case in *Barnard, Admr.*, v. *District of Columbia* (20 C. Cls. R., 257). The contract with Barnard's intestate included the "30 cents per cubic yard for grading." The board, just before making the contract, had entered on its journal: "Chief engineer was notified that the following price was estab-

lished for rock excavation, viz: Cutting down streets and the like, $1. Auditor and contract clerk notified."

Claimant urged he was entitled to this $1 per cubic yard for rock excavation. The claim was disallowed on the ground that the excavation was included in "earth, stone, or gravel." On appeal to the Supreme Court, this position was affirmed. (*Barnard* v. *District of Columbia*, 127 U. S., 409.)

4. As to rates for haul increased over contract rates.

The increased rates were claimed in the petition and are allowed by the court here. They were disallowed by the court at the first trial, and the reasons given. (22 C. Cls. R., 384.)

> On the 15th of July, 1873, the board entered upon its records and notified the contract clerk and auditor "that the price for hauling earth had been established at 1¼ cents per cubic yard for every 100 feet of haul over the first 200 feet *since June* 1, 1873," and on the 27th of September, 1873, "that in settlements of accounts for extra haul 1¼ cents per cubic yard for each additional 100 feet beyond the first 200 feet for all work done *since January* 1, 1873, be allowed." (Finding II.) As a direction to subordinate officers in the drawing and settling of *future contracts* this was within their authority, but existing contracts could not be thus altered so as to bind the District to new and greater obligations. Such attempted alterations would constitute new contracts, required, as we have seen, to be in writing and signed by the parties. Yet the claimant demands the increased rates for all work done *after January* 1, 1873, under

his then existing written contracts entered into a year or more previously to these memoranda.

* * * * *

Nor was the fact that the board had in a few instances granted the new prices for old work under old contracts any consideration for payment in like manner on all outstanding written contracts. In reality this increase as to preexisting contracts was nothing more nor less than a gratuity which the board directed the auditor to allow to contractors, and which they had no authority to grant from public funds. These memoranda were not signed by anybody as contracts were by law required to be signed, were unilateral, and not addressed to claimant, and he was not privy to them. They undertook to give additional compensation to contractors at 150 per cent above their written contract agreements, making every $100,000 of work at contract price cost the District $250,000

It was to prevent such proceedings as this by authority of sanction of the legislature that Congress, in the statute organizing the District government and the board of public works, enacted the following section:

"SEC. 16. The legislative assembly shall never grant or authorize extra compensation, fee, or allowance to any public officer, agent, servant, *or contractor*, after such service has been rendered *or a contract made*, nor authorize the payment of any claim or part thereof hereafter created against the District under any contract or agreement made, without express authority

of law; *and all such unauthorized agreements or contracts shall be null and void.* (Act of February 21, 1871, ch. 62, sec. 15; 16 Stat. L., 423.)"

It was the consummation of just such pernicious and illegal practices by the board of public works that contributed to swell the debt of the District of Columbia to more than $20,000,000. The gratuitous distribution of public money, under whatever pretense, was not within the legitimate and legal powers of the board of public works.

* * * * *

The questions, then, are: Can this court enforce claims founded upon these memoranda of the board of public works? Could the board of audit rightfully allow any such claims? Could the board of public works legally pay them?

In the numerous cases which have been before us under the District claims act we have uniformly and unanimously held otherwise; and now, after having completed nearly all the business under that act we see no reason for changing our rulings. (*Roche's case*, 18 C. Cls. R., 227; *O'Hare's case*, 18 C. Cls. R., 646; *Campbell and Eslin*, 18 C. Cls. R., 193; *Little's case*, 19 C. Cls. R., 327; *Barnard's case*, 20 C. Cls. R., 257; *Sanders' case*, 20 C. Cls. R., 337; *Betts' case*, 20 C. Cls. R., 445.)

We have seen that the items of dispute in the case at bar were settled in favor of the appellant by reference to certain conclusions of law. We have seen that these principles of law were considered, main-

tained, and applied in a long line of kindred cases in the Court of Claims. In the case of *Eslin* v. *District of Columbia* (22 C. Cls. R.), a case decided on the same day, the case of Barnes was fully approved. In *Barnard* v. *District of Columbia* (supra) this court, by Judge Field, said:

> The act of Congress of February 21, 1871, "to provide a government for the District of Columbia," in force at the time, required that all contracts by the board should be in writing, be signed by the parties making the same, and a copy thereof filed in the office of the secretary of the District, and it forbade the allowance of any extra compensation for work done under a contract. (16 Stat. L., 419, 423, ch. 62, secs. 15, 37.)
>
> The entry in the journal of the board was no part of the contract with the claimant, nor could it in any respect control the construction or limit the effect of such contract. The board could not in that way either make a new contract or alter the one previously made so as to bind the District. (*Barnes* v. *District of Columbia*, 22 C. Cls., R. 366.)

The correctness of this judgment upon these matters outside the contract appears to have been recognized and acquiesced in by the appellee. Nothing further was done by him until after the passage of the act of February 13, 1895 (*supra*), which provided that in the adjudication of claims brought under the act of 1880 the Court of Claims shall allow the rates established and paid by the board of public works, and whenever

said rates have not been allowed the claimant or his personal representatives shall be entitled to a new trial of his case. Under this act the petitioner came in and asked the court for a judgment upon these disallowed items seven years after it had been decided he was not entitled to them. His case was heard and a judgment rendered in his favor for $31,754.57 (which is almost identical, with one exception, with the judgment now appealed from) "under the act of February 13, 1895." (Tr., p. 9.) Of course in this judgment all counterclaims were excluded, because the counterclaims were based upon unauthorized board rates. The exception arises from the increased amount of excavation on North Carolina avenue and makes the judgment, exclusive of some allowed counterclaims (not those in dispute), $36,734.26. (Tr., p. 32.)

If this claimant was entitled to recover on these claims now in dispute, why this abandonment, and resurrection of the suit under this later act? Why, if standing alone and apart he had valid claims under the act of 1880, did he join the ranks of those whose only right was under the act of 1895? The object and effect of that act have been clearly determined by this court.

In District of Columbia *v.* Johnson (*supra*), Mr. Justice Peckham said:

> Prior to the passage of that act many of those contractors, in whose favor "board rates" had been allowed instead of the prices which were contained in the contracts executed by them, had brought suits against the District of

Columbia of a nature similar to the two suits now here, and had based their claims as to the balance due them with reference to the board rates allowed for work done under the contracts instead of the prices named in such contracts. Those claims had been held to be illegal, and the District of Columbia had successfully defended the actions and had succeeded in obtaining judgments allowing counterclaims in its favor for the difference between the prices as named in the contracts and those which had been paid by the board.

The Court of Claims had decided many cases to that effect, among which are those of *Roche* (18 C. Cls. R., 217), *Barnard* (20 C. Cls. R., 257), *Barnes* (22 C. Cls. R., 366), and *Eslin* (22 C. Cls. R., 160; 29 C. Cls. R., 370). This court had held the same proposition in *Barnard* v. *District of Columbia* (127 U. S., 409). The ground upon which the recovery on the counterclaim had been allowed was the illegality of altering the prices named in the contracts and of paying any greater sums for the work contracted to be done than was provided for in the written contracts, and payments beyond those sums were held to have been illegal.

Prior to the passage of the act of 1895, therefore, it is undisputed there was no claim, legal or equitable, which the parties could successfully maintain against the District of Columbia for the recovery of board rates for work done under written contracts with the municipal authorities, but such work could only be legally paid for at the prices named in the various contracts for such work.

These authorities would seem to have brought this case within the rule of *stare decisis*. But the appellees have endeavored to relieve themselves by contentions that after the execution of the contracts alterations and changes were made by verbal understandings and agreements with members of the Board of Public Works. These positions are utterly untenable. If the board could not alter the terms of the contracts by entries officially made on their record, members of the board could not alter them by amiable conversation and promises. The findings of the court nowhere find that these increases were new contracts.

As Judge Richardson pertinently said (*supra*), the grading of particular streets named was the work contracted for. The amount was not designated. In all the 342 contracts, which became the object of difference and examination, nowhere can be found any allusion to change of grades and diminution or enlargement of work in relation to that fact. The reference to dates, when certain work was done to bring streets to this or that grade, appears nowhere in the petition nor in the elaborate first trial of the case. The petition alleges work done under and connected with the contracts, and claims always, generally and in detail, for work done *under the written contracts*. We submit, in addition to the illegality of these increased rates, that the findings, if they were to be interpreted as declaring new contracts, would not be responsive to the allegations of the petition.

The new contracts would be *ultra vires*. Agents and officers of a municipal corporation can not bind

the corporation by any contract beyond the scope of its powers. The law of the district required that all contracts made by the board of public works should be in writing and signed by the parties. These words are mandatory. As said in *Clark* v. *United States* (95 U. S., 539), of a similar statute:

> It makes it unlawful for contracting officers to make contracts in any other way than by writing, signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law.

To further obviate the objections that the contentions of the appellee and the findings of the court are not responsive to the allegations of the petition and to the issue at the former trial of the case, it will be urged that there is in the record an amended petition which exactly parallels the findings. (Tr., p. 10.)

The answer to this is twofold. First, this paper was filed without notice, without leave of the court, and not until nearly two months after submission of the case. Second, it created entirely new causes of action, which could not be considered by the court by reason of the limitation in the statute.

If there is any fact evident upon the face of this statute it is the intention of Congress that the matters embraced in it should be speedily determined. The claimant (7 sec.) is required to prosecute his action

diligently. He is also required to present his petition within six months after the passage of the act. This was a statute of limitations. "The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded." (*The Harrisburg*, 119 U. S., 199, 214.)

The amended petition under which the case was tried (Tr., p. 3) states that claimant entered into contract No. 264, for the improvement of North Carolina avenue and D street, and contract No. 413, for the improvement of Second, Third, and Fourth streets, and then refers to the extensions. All the accounts are set up as done under these contracts and extensions. But this amended petition of March 11, 1902, simply filed in the clerk's office after submission of the case, endeavoring to meet and overcome the decision and adjudication of the court in the former case, sets up an entirely new case. By reference to the times at which grading was done, and allegations that the District had changed the grades of streets and required more excavation to be done, they now allege that there was an understanding and agreement that the additional board rates should be paid; and they also ask the court to reform the contracts.

Of this latter equitable relief there was nothing in the former petition. And as to the grading, the former petition puts its right of recovery on another and inconsistent ground, viz: "That, owing to the unforeseen

rise in the price of labor after said contracts Nos. 264 and 413 were first executed, the board of public works, by an order duly entered upon its official records, modified said contracts by changing the rates to be paid for extra haul from one half cent to 1¼ cents per yard per 100 feet; that such extra haul was fully worth the said increased price; and that in all partial settlements made by defendant's officers the justice, validity, and binding character of said modifications had been fully recognized, and payments made accordingly." (Tr., p. 7.)

The Court of Claims and this court have decided a claimant can not recover upon these causes of action. To recover for these identical amounts new causes of action were sought to be set up long after the time limited for bringing suit. This can not be done. This whole matter was exhaustively considered by Mr. Justice White, delivering the opinion of this court in *Union Pacific Railway* v. *Wyler* (158 U. S., 285), who said, *inter alia:*

> The general rule is that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is, that as the running of the statute is interrupted by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged, by way of amendment, which are part thereof.

But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies.

* * * * *

In Alabama the court said:

While a new cause of action may be introduced by amendment, the established limitation on the operation of its relation to the commencement of the suit is, that if the amendment introduces a new matter or a different cause of action not within the *lis pendens*, as to which the statute of limitations has operated a bar at the time of making the amendment, it is as available as if the amendment were a new and independent suit. (*Alabama G. S. R. Co.* v. *Smith*, 81 Ala., 229.)

Other applications of the doctrine may be found in the following cases: *Toby* v. *Allen* (3 Kan., 399); *Hiatt* v. *Auld* (11 Kans., 176); *North Chicago Rolling Mill Co.* v. *Monka* (107 Ill., 340); *Crofford* v. *Cothran* (2 Sneed, 492); *Flatley* v. *Memphis & C. R. Co.* (9 Heisk, 230); *Dudley* v. *Price* (10 B. Mon., 84); *Buntin* v. *Chicago, R. I. & P. R. Co.* (41 Fed. Rep., 744); *Atlantic & P. R. Co.* v. *Laird* (58 Fed. Rep., 760).

Nor do we think this question is in any way affected by the fact that the second amended petition was filed by consent. The consent covered the right to file it, but did not waive the defenses thereto when filed. If the interruption to the running of the statute created by the first summons applied only to the cause of action therein set out, it would have required an express renunciation of the benefit of the statute

which had fully operated upon the new cause of action set out in the amended petition when that petition was filed.

The *tenth* assignment of errors is directed to the construction of the act of 1880. If it was intended by the court below to hold that there was anything in that act to validate contracts illegal under the previous laws, we respectfully submit that was manifest error. The act of June 20, 1874 (18 Stat. L., 116), which provided for the establishment of a commission for the government of the District of Columbia, authorized it to exercise all the power and authority before lawfully vested in the governor or board of public works, "except as hereinafter limited," and "it shall be subject to all the restrictions and limitations now imposed by law on said governor or board." "But said commission, in the exercise of such power or authority, shall make no contract nor incur any obligation other than such contracts and obligations as may be necessary to the faithful administration of the valid laws enacted for the government of said District, to the execution of existing legal obligations and contracts, and to the protection or preservation of improvements existing or commenced and not completed at the time of the passage of this act."

We have already referred to the power of the governor and the board of public works in the matter of contracts.

The act of 1880 is a statute of jurisdiction. It created no rights; it established no contracts. When it extended the jurisdiction of the Court of Claims of claims against

the District of Columbia, it was of lawful claims. If the Board of Commissioners had made contracts for extravagant prices to be paid for expensive improvements, this act did not ratify their acts. The very specifications of the subjects of jurisdiction, "contracts made by the board of public works and extensions thereof made by the Commissioners of the District of Columbia," show the claims of the character embraced in this suit. And that language of distinction forbids their inclusion in the other mentioned classes in the act.

This construction has been entertained and acted upon in the previous adjudication of cases brought under the act, both in the Court of Claims and this court. It so remained as the law until the passage of the act of 1895 (supra). That act gave as a gratuity a large part of what is claimed in this suit at bar. And, although that act has been repealed, the claimant still insists he is entitled to what was given to him by it. This, in its last analysis, is the claim now urged upon this court.

I have had printed a certified copy of the docket entries in the case in the court below, for the use of the court, which I respectfully ask may be received as an appendix to this brief.

Respectfully submitted.

ROBERT A. HAYARD,
Special Assistant U. S. Attorney.

LOUIS A. PRADT,
Assistant Attorney-General.

O

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Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. ~~484~~ 143.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ELIAS E. BARNES, APPELLEE.

MOTION TO DISMISS AND BRIEF FOR THE APPELLEE.

JOHN C. FAY,
Attorney for Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9207

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 484.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ELIAS E. BARNES, APPELLEE.

MOTION TO DISMISS.

Now comes the appellee, by John C. Fay, his attorney, and moves the court to dismiss the appeal in this cause for want of jurisdiction to entertain the same.

JOHN C. FAY,
Attorney for Appellee.

BRIEF FOR THE APPELLEE.

This is a motion to dismiss a second appeal of the District of Columbia upon the ground that no appeal lies in this case; hence this court is without jurisdiction to entertain it.

STATEMENT OF THE CASE.

This was a suit brought in the Court of Claims by the appellee against the District of Columbia under the act of June 16, 1880 (21 Stat., 284), conferring on that court jurisdiction to hear and determine suits against the District of Columbia to recover for work and labor performed (or material provided) by him in the improvement of the streets of the city under contracts with the District.

The suit was brought August 4, 1880, and has been in almost continuous litigation in that court from that time until March 31, 1902, when a final judgment was rendered.

The jurisdictional act of June 16, 1880 (21 Stat., 284), provided in section 3 for appeals to this court if taken within ninety days after the rendition of the judgment, and section 6 provided a method for the payment of judgments so rendered, viz:

"SECT. 6. The Secretary of the Treasury is hereby authorized to demand of the sinking fund commissioner of the District of Columbia so many of the three sixty-five bonds authorized by act of Congress approved June twentieth, eighteen hundred and seventy-four, and acts amendatory thereof as may be necessary for the payment of the judgments; and said sinking fund commissioner is hereby directed to issue and deliver to the Secretary of the Treasury the amount of three sixty-five bonds required to satisfy the judgments; which bonds shall be received by said claimants at par in payment of such judgments, and shall bear date August first, eighteen hundred and seventy-four, and mature at the same time as other bonds of this issue: *Provided*, That

before the delivery of such bonds as are issued in payment of judgments rendered as aforesaid on the claims aforesaid, the coupons shall be detached therefrom from the date of said bonds to the day upon which such claims were due and payable; and the gross amount of such bonds heretofore and hereafter issued shall not exceed in the aggregate fifteen millions of dollars: *Provided*, The bonds issued by the authority of this act shall be of no more binding force as to their payment on the Government of the United States than the three sixty-five bonds issued under the authority of the act of June twentieth, eighteen hundred and seventy-four" (21 Stat., 286).

A subsequent statute, act of March 3, 1881 (Supp. Rev. Stat., vol. 1, p. 605), gave to the Treasurer of the United States, who was *ex officio* under act of June 11, 1878 (sec. 7, Supp. Rev. Stat., vol. 1, p. 179), commissioner of the sinking fund of the District of Columbia, the *option* of delivering the bonds in satisfaction of these judgments, or of selling the bonds and paying the judgments in cash. This gave the District the benefit of the premium on the bonds whenever they were at a premium, and the creditor the loss on the bonds whenever they were at a discount.

This continued to be the law until 1900, when it was changed by the following amendment inserted in the general deficiency appropriation bill of that year, act approved June 6, 1900, viz:

* * * * * * *

"Defending suits in claims.—For defending suits in the United States Court of Claims, two thousand dollars: *Provided*, That *no judgment heretofore* or *hereafter rendered under the act of June sixteenth, eighteen hundred and eighty*, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' *shall be paid by the Secretary of the Treasury until said judgment shall have been* REPORTED TO, *and specific authority for payment thereof granted by, Congress.*"

* * * * * * *

approved June 6, 1900 (Statutes at Large, vol. 31, chap. 789, p. 572).

After the passage of this amendment this case was finally heard, and judgment was rendered in favor of appellee in the Court of Claims March 31, 1902, for $23,694.47. From that judgment, and within ninety days thereafter, on April 22, 1902, an appeal was taken to this court by the present appellant, and such appeal was docketed July 29, 1902, as No. 400, on its October term calendar of 1902.

On October 23, 1902, appellee moved to dismiss the appeal for want of jurisdiction, and on December 8, 1902, this court granted the motion and dismissed the appeal for want of jurisdiction, and its mandate went down to the Court of Claims January 8, 1903.

Barnes *vs.* D. C., 187 U. S., 638.

March 3, 1903, an amendment was inserted in the general deficiency appropriation bill of that year in the following terms, viz:

JUDGMENTS, COURT OF CLAIMS.

"For the payment of the judgments * * * *And provided further*, That the proviso contained in the act approved the sixth day of June, anno Domini nineteen hundred, entitled 'An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes,' which reads as follows: *Provided*, That no judgment heretofore or hereafter rendered under the act of June sixteenth, eighteen hundred and eighty, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by, Congress, be, and the same is hereby, repealed; and from all final judgments or decrees heretofore rendered in suits of the character of those mentioned in said proviso an appeal shall be allowed to the Supreme Court of the United States at any

time within ninety days after the passage of this act, except in cases where the amounts found due by said court have been paid at the Treasury."

Act approved March 3, 1903, chap. 1006, Pub. Laws, 2d sess., 57th Cong., p. 1070.

On the 20th day of May, 1903, FOURTEEN MONTHS after the rendition of the judgment, the District of Columbia undertook to take a *second appeal* from this judgment of March 31, 1902, claiming a right so to do under the provisions of the amendment to the general deficiency bill of March 3, 1903, and that appeal having been transmitted here, the appellee now moves to dismiss it for want of jurisdiction.

ARGUMENT.

The appellee contends, from this statement of the record, that the judgment of the Court of Claims was a final judgment on the 31st day of March, 1902, and his rights thereby became finally vested, the District of Columbia's right to an appeal having been adjudged to be without foundation, and that the paragraph in the act of March 3, 1903, in so far as it is claimed confers upon the District of Columbia the right of appeal, is absolutely null and void for the reasons:

First. That it is the exercise of a judicial and not a legislative power, and that no judicial power is by the Constitution vested in the Congress of the United States.

Second. That its application to the case of Barnes *vs.* The District of Columbia would be to give it the effect of a retrospective law destroying vested rights, not permissible and not within the power of Congress.

The status of the District of Columbia as a municipal corporation is defined both in its charter under the act of February 20, 1871, establishing the Board of Public Works, etc.

(sec. 2, Rev. Stat. D. C., p. 1), and the act of June 11, 1878 (vol. 20, p. 102). The very apt words in the act establishing the present form of government are in its first section:

"The District of Columbia shall remain and continue a municipal corporation, as provided in section two of the Revised Statutes relating to said District, and the Commissioners herein provided for shall be deemed and taken as officers of such corporation; and all laws now in force relating to the District of Columbia not inconsistent with the provisions of this act shall remain in full force and effect."

Section 2, Revised Statutes of the District of Columbia, provides:

"The District is created a government by name of the District of Columbia, by which name it is constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this title."

That section was construed by the Supreme Court of the United States in the case of Barnes *vs.* The District of Columbia, 91 U. S., 543, to hold the District of Columbia liable as a municipal corporation for the negligence of its officers; not only those they had the power to appoint themselves, but even such officers as were appointed by the United States without their consent or concurrence.

It fixed indisputably the status of the District of Columbia as a municipal corporation, liable for its obligations, as well as liable for the negligence of its officers.

In the case of Metropolitan Railroad Company *vs.* District of Columbia, 132 U. S., p. 1, this court, construing sec. 2, Revised Statutes of the District of Columbia in connection with the act of 1878, *supra*, and reviewing all legislation, held the District of Columbia to be a municipal corporation,

subject to the ordinary rules that govern the law of procedure between private persons.

It was distinctly claimed in that case that the District of Columbia was a separate State or sovereignty; but this claim was emphatically denied.

Mr. Justice Bradley, speaking for this court, on page 3 of the opinion, says:

"The first question, therefore, will be, whether the District of Columbia is, or is not, a municipal body merely, or whether it has such a sovereign character, or is so identified with or representative of the sovereignty of the United States as to be entitled to the prerogatives and exemptions of sovereignty."

And again, after reviewing all the legislation with reference to the government of the District from its first organization (pp. 3–7), the court adds (p. 7):

"In view of these laws, the counsel of the plaintiff contend that the government of the District of Columbia is a department of the United States Government, and that the corporation is a mere name, and not a person in the sense of the law, distinct from the Government itself. WE CANNOT ASSENT TO THIS VIEW. It is contrary to the express language of the statutes. That language is that the District shall 'remain and continue a municipal corporation,' with all rights of action and suits for and against it."

And on page 9:

"We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and SUBJECT TO THE ORDINARY RULES THAT GOVERN THE LAW OF PROCEDURE BETWEEN PRIVATE PARTIES."

The pretensions of the appellant that this is substantially a suit against the United States, and hence against the sovereign, and the right to sue is a mere matter of grace, which may be withdrawn, modified, or changed at the pleasure of the sovereign, has no foundation upon which to rest and is most effectually disposed of in the foregoing case. It is true

that the defense of the District under the act of June 16, 1880, is placed in the charge of the Attorney General, and that a kind of spiritual liability is assumed by the United States to see that the District meets her obligations growing out of her issue of 3.65 bonds, a liability no stronger than its obligation to *appropriate* for the payment of judgments rendered in the supreme court of the District of Columbia under the act of 1878. But that does not make the United States a defendant in law or in fact, nor does the imposing of duties relating to the District upon the Attorney General produce such an effect. In point of fact, the Attorney General has not heretofore conducted, nor does he now conduct, any such defense, but confides it to a special assistant attorney, who is paid out of the revenues of the District of Columbia. (See acts.)

The imposing of duties relative to the District upon United States officers and the contribution by the United States of appropriations for the improvement, repair of streets, sewers, etc., and other purely municipal objects has been in vogue for a century, and the Secretary of the Interior, the Secretary of the Treasury, the Treasurer, the Comptrollers, and many other officers have from time to time performed, and some still perform, duties purely municipal in their character, as pointed out by this court in the Metropolitan Railroad case and the Barnes case, cited *supra;* but neither the one nor the other or all three combined operate to change the status of the District of Columbia or raise it from its character of a purely municipal corporation.

So in entering this discussion we eliminate any question of sovereignty. This is a litigation between private parties pure and simple. Both stand upon equal ground, neither enjoying any special exemptions or privileges.

While it may be conceded that the United States may impose, and vary them at its pleasure, any conditions giving the right of suit against the sovereign or withdrawing the right altogether, it is most strenuously contended that the

legislature cannot intervene to grant special privileges or additional privileges to one litigant and to destroy or impair the vested rights of his antagonist.

It is immaterial whether at the date of the rendition of the Barnes judgment the District of Columbia had the right of appeal or not. The right of appeal is not a vested right and can be withdrawn by the legislature even after it has accrued, and that has been frequently done, and legislation of that kind has been affirmed by the Supreme Court (R. R. *vs.* Grant, 98 U. S., 398).

The converse of the proposition is quite another question. When one has a judgment that is final, he has a vested right in property and that cannot be taken away from him by the legislature. Congress has no more power, by the grant to it of exclusive legislation, over the District of Columbia, than a State has over its territory.

The clause in the Constitution by virtue of which Congress governs the District of Columbia is in the following language:

"SEC. 8. To exercise exclusive legislation in all cases whatsoever over such District not exceeding ten miles square, as may be by cession of particular States, and the acceptance of Congress, become the seat of Government of the United States."

It does not confer upon Congress the right to exercise any judicial power over the District of Columbia. All judicial power, by article 3 of the Constitution, is vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

It can hardly be contended that the allowance of an appeal in favor of one party to a litigation is not the exercise of judicial power. To permit Congress to grant appeals or new trials with respect to private individuals would be to carry back to the dark ages the principles upon which the civilization of today rests. No blacker page in the history of the

law can be found than that of the time when the legislature controlled the independence of the judiciary, and those provisions in some of the colonial charters which granted to the legislature the right to grant new trials to litigants were wiped out by the Constitution of the United States and every one of the States. Since that time there can be found no case, except in a suit to which the State or the United States was party, where a new trial or an appeal has been allowed.

Of course, where the State was successful, she might consent that her citizen should have a new trial, and there have been, possibly half a dozen, cases where citizens unjustly convicted have been awarded a new trial by the legislature on account of such unjust conviction, or where the United States has authorized a *new trial as against herself* where she has obtained an inequitable judgment, but these are all founded on the doctrine of the consent of the successful litigant. I can find no case where as between private parties special legislation interfering with the rights of the successful litigant and disturbing his judgment has been sustained.

This doctrine is fully sustained by numerous authorities. See—

Lewis *et al. vs.* Webb, 3 Me., 326. Opinion by Chief Justice Mellin.

Durham *vs.* Lewiston, 4 Me., 140.

Merrill *vs.* Sherburne, 1 N. H., 199. Opinion by J. Woodbury.

Bates *vs.* Kimball, 2d chap. (Me.), 77. Opinion by J. Aikins.

Sydnor *vs.* Palmer, 32 Wis., 409. A very learned opinion by Dixon, C. J.

Town of Lancaster *vs.* Barr, 25 Wis., 560.

Davis *vs.* Menasha, 21 Wis., 491.

Stanford *vs.* Barry, 1 Aikins, 314.

The appellee submits that this motion should be granted and this protracted litigation, extending now over a period of twenty-five years, be ended, and the appellee during his lifetime should be paid for the labor and material which he expended in beautifying the streets of this city more than a *third of a century* ago.

Respectfully submitted.

JOHN C. FAY,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 484.

THE DISTRICT OF COLUMBIA

vs.

ELIAS E. BARNES.

Reply Brief.

There is much in the brief of the appellant to which I can take no other exception than to say it appears to me utterly foreign to the questions at issue.

The recital of the act of 1871 and the decisions of this court referred to are relied on by me in my original brief, but the language on page 4, "If a suit, &c., had been brought in one of ITS COURTS;" and further down, "The suit is not brought under the statutes CREATING the MUNICIPALITY," I do not exactly comprehend. It is the first time I have ever heard, and I have been a member of its bar for over thirty-five years, that the supreme court of the District of Columbia was other than a United States court, or that it was the creature of that municipal corporation designated the District of Columbia, which did not exist for at least

eight or nine years after the establishment of the court. I was not, nor am I yet, aware that that municipality *had* courts of its own. I have always thought and still think that the District of Columbia is amenable to the supreme court of the District by virtue of its habitat within the territorial jurisdiction of the court, and the words District of Columbia, as applied to the court, was a mere convenient mode to define its territorial jurisdiction, not to make it a municipal court; and such is undoubtedly the law. The other phrase seems to indicate that a municipal corporation can be amenable only to such courts as existed at the date of its charter, and that no subsequently established court can have its jurisdiction so enlarged as to embrace it. That doctrine is equally untenable. Congress has power to create new courts or increase the jurisdiction of existing ones, as it did by the act of June 16, 1880, so as to make the District amenable to their process, and the municipal corporation, as the creature of Congress, has no rights whatthat the Congress is legally bound to respect. Its power over it is supreme and limitless. The appellant devotes part of his brief apparently to an effort to induce the court to believe that it erred in dismissing the former appeal, but his argument now is even weaker than his former brief, and I may well let that question, which is in no way involved here, rest where this court left it.

While the brief fairly concedes the general rule of law with respect to the invasion by Congress of the judicial power, it has undoubtedly happened, as stated by the Chief Justice in *Stevens vs. Cherokee Nation*, 174 U. S., 478—

"That the grant of a new remedy by way of review has often been sustained UNDER PARTICULAR CIRCUMSTANCES."

There is nothing in this case which would authorize Congress to take it out of the general rule.

Every opportunity has been offered and taken advantage of by the *special assistant attorneys* representing the Dis-

trict. Patient trials and retrials have been had. The District has not only had *its day* in court, but it has had ever since August 4, 1880, the date of filing the petition (Rec., p. 1), more than *twenty-three years*, in lieu of a day, and it still seeks to protract this litigation with formal and non-meritorious appeals until it shall at least round out a full *quarter of a century*. The District has had *three* patient, protracted, and painstaking trials in the Court of Claims, one appeal to this court, and two appeals to the lobby, where that iniquitous legislation known as "riders" to appropriation bills has been resorted to to overturn orderly, judicial procedure and protract the official longevity of special assistant attorneys, and as a result of this unwise, ill-considered, and vicious legislation the appellant is now here seeking a second appeal to this court, and that, too, in a case where, as the findings of fact clearly show (Rec., pp. 4–20), the appellee has been awarded only the *exact price* that both parties to the contract, at the time fully understood and agreed, was to be his compensation and the *exact quantity of work* performed by the appellee, "which work was accepted by the Commissioners and the District received the benefit of" (Rec., Findings IX (10), XIII, (20).

This case furnishes an object-lesson that more than vindicates the views of Mr. Justice Brewer on the subject of the abuse of appeals, as expressed in the *Independent* of October 29, 1903. The action of the appellant is such an abuse, and it is confidently submitted that it should find no sanction in this court.

The cases cited by the able special assistant attorney to warrant the maintenance of this appeal all were "sustained under particular circumstances;" they differed from this case in that they had *merit*, of which this is utterly devoid; and while in the administration of justice it is permissible, and even possibly wise, to do a "little wrong" to accomplish a great good, the converse of the proposition, that "a great wrong" may be done to accomplish "no good whatever," is not at

all sustainable. Permit me to review the cases cited on page 15 of his brief and point out the inapplicability or peculiar circumstances that justified their exemption from the general and otherwise universal rule.

Calder *vs.* Buel, 3 Dall., 386:

> That case has no application; it was a construction of the colonial charter of Connecticut, under which, by royal charter, the legislature was empowered to grant new trials, and notwithstanding it was obnoxious to the principles that our Revolutionary forefathers fought for and won, still that principle, the independence of the judiciary, was not given a *retrospective* effect. It is, instead of aiding my adversary, a strong authority against giving a retrospective effect to the legislation herein complained against. See remarks of Chief Justice Mellin in Lewis *vs.* Webb, reviewing this case and refusing to follow it for the reasons above given (3 Maine, 326).

Sampeyreac *vs.* U. S., 7 Peters, 222:

> In this case the original decree, which was the subject of a bill of review, *was a mere nullity* and the act in that case was limited to such cases in which the original decree was founded upon forgery and fraud; and the further reason that the original proceedings were against the *sovereign*, whose power to make or increase conditions is conceded in all proceedings against itself.

Freeborn *vs.* Smith, 2 Wall., 160:

> This case simply permitted a *casus omissus* to be remedied by making provision as to what became of the cases pending in the territorial courts of Nevada, no mention being made in the act admitting it as a

State. It does not at all touch the doctrine contended for by appellee.

Garrison *vs.* New York, 21 Wall., 196:

This case simply holds that the sovereign State of New York in taking property for public use, under the law of eminent domain, may vacate any inquest taken by her direction and order a new one when the first proceeding has been fraudulently or irregularly conducted; that no vested rights accrue till the property is actually taken.

Freeland *vs.* Williams, 131 U. S., 405:

Holds simply that that provision in the constitution of the State of West Virginia prohibiting seizure of goods in payment of judgments rendered on account of acts done according to the rules of civilized warfare during the civil war was not obnoxious to the clause in the Constitution forbidding the impairment of the obligation of contracts by the several States.

Essex Public Road Board *vs.* Skenkle, 140 U. S., 334:

This case turned upon the power of the legislature over its municipal corporations, or quasi corporations, created for public purposes. They are merely governmental agencies, exist wholly for public purposes, and the power of the legislature over them is *plenary*. It has often been held that they may be compelled to pay claims to which they have valid legal defenses, and it is no doubt true that this present legislation is good as against the District of Columbia, and an appeal by Barnes would lie. The act of June 16, 1880, would be *unconstitutional* if the Congress had not this plenary power over the District, for that *act* would de-

Dist. Cola. vs. Johnson, 165 U.S. 330-338

> prive the municipal corporation of its constitutional right of the trial by jury, if it had any such right. But the act is not within the power of Congress as against the citizen. This question is fully discussed in Judge Dillon's excellent work on Municipal Corporations.

Stevens *vs.* Cherokee Nation, 174U. S., 445:

> The status of Indian tribes is akin to that of municipal corporations with respect to the power of Congress over them. They have been designated by this court "as wards of the nation." Congress is their guardian; it legislates in a quasi-paternal way over them; they are not citizens, but a "dependent nation," and as in this case great public scandal and fraud had followed immature and hasty legislation, those "*particular circumstances*" were present that in the interest of public justice warranted the examination of the *political* question of tribal citizenship by this court.

The appellee confidently rests his contention upon the cases cited in his original brief and respectfully insists that the act of March 3, 1903, confers no jurisdiction on this court to entertain this second appeal.

II.

But if the appellee is in error as to his right to have this cause dismissed for want of jurisdiction, this motion may, he submits, under the terms of paragraph 5 of rule 6, be taken and treated as a motion to affirm, there being clearly no appealable question presented in the record, the appeal being for *delay merely*. This record affords clear evidence thereof, for while this retrospective act was passed March 3,

1903, and applicable only to this case (R., p. 25), it was not until May 11, 1903, that even an application for appeal was filed, and that was permitted to rest till *October 26, 1903*, five months after its filing, and one motion day after another was allowed to pass without calling it up; and in not filing the transcript in this court until November 21, 1903, the appellant gained *nine months'* delay and prevented the appellee from raising this question at the *last* term of this court. A reasonably prompt exercise of the appellant's claimed rights would have secured to appellee an early hearing. The appellee further suggests that the language of the act provides that the "appeal shall be *allowed*" within *ninety days*, and although rule 3 does suspend the limitation of time from running pending the application for an appeal, under the general law, it is still debatable whether this *rule* can or ought to have any application to this *special* appeal. It is submitted that it does not apply, and that under the circumstances the appellant ought not to profit by his *laches*. If the whole course of legal procedure is to be waived retrospectively for his benefit, he ought to at least to be diligent in availing himself of it, especially where the appellant is represented by not only the Assistant Attorney General, but by a *special assistant attorney*. For this reason alone the appeal should be dismissed.

Motion to Affirm.

There is no question of law raised by this record. Any one that has progressed only so far in the study of the law as to have reached even a casual reading of the Eighth Commandment, would not have the slightest trouble in comprehending and mastering every question that can possibly arise; and if the case ever proceeds further in this court, it will overtax the almost limitless and inexhaustible ingenuity of the learned and erudite special assistant attorney to get up

even a *pro forma* assignment of errors. There are absolutely none presented in the findings. The whole record prescribed under rule 1 of this court is printed; no part of the record prescribed by this court is omitted. This is practically admitted by the appellant, for in his brief, on page 7, while truly saying that a judgment in favor of the District was once rendered and a new trial was granted (but omitting to mention that on that new trial a judgment for a very large amount was rendered in favor of appellee, and subsequently the District was granted a new trial, and on the *third* trial a still larger sum was found in favor of the appellee; which *third* judgment is the one now appealed from) concludes with the remarkable statement that the questions he proposes this court shall review are questions relating to matters of practice in the Court of Claims, or questions addressed to the discretion of that court in the granting or refusing new trials; for he says:

"A new trial (the first one) was granted, and after proceedings, MANY OF WHICH WERE MADE THE SUBJECT OF EXCEPTIONS, which will appear upon the trial of the merits, a judgment was entered in favor of claimant."

A fair, frank, and full concession that the questions he seeks to have reviewed are questions of practice or questions raised by bills of exception, which do not and cannot exist, in an appeal from the Court of Claims; and the right to review questions of that character is, apparently, seriously contended for in the very teeth of the law quoted by him on page 6 of his brief, that this very right of appeal is granted *only* subject to such rules and regulations as this court shall prescribe (Sec. 2, act June 16, 1880, Supp. R. S., vol. 1, p. 563), and that rule 2 of this court prescribing the rules and regulations for appeals in District of Columbia cases carefully omits from the record on appeal *every such question;* and the still further fact that this court has held again and again that the Court of Claims was bound by no strict rules

of pleading or practice (U. S. *vs.* Behan, 110 U. S., 338; Clark *vs.* U. S., 95 U. S., 539; U. S. *vs.* Burns, 12 Wall., 246).

And the Court of Claims itself has frequently so announced.

Nothing is left but *questions of fact*, which are conclusively settled by the findings of fact (R. R. Co. *vs.* U. S., 116 U. S., 154, and 117 U. S., 355; Mahan *vs.* U. S., 14 Wall., 109).

I therefore most respectfully but most urgently insist that, even though this harsh and cruel statute must stand, this court shall exercise the power it has so often decided it possesses (see U. S. *vs.* Grant, 110 U. S.) and consider this motion as well a motion to affirm, and in the interest of justice not permit this litigation to be uselessly and needlessly further protracted—*cui bono*—nor allow this aged man to go down to his grave in penury and want, while the appellant still enjoys the benefit of his labor and capital.

Respectfully submitted.

JOHN C. FAY,
Attorney for Appellee.

APPENDIX.

LEGISLATIVE HISTORY OF THE PASSAGE OF THE AMENDMENT TO THE GENERAL DEFICIENCY BILL, APPROVED MARCH 3, 1903, AUTHORIZING APPEALS IN DISTRICT OF COLUMBIA CASES FROM THE COURT OF CLAIMS TO THE SUPREME COURT OF THE UNITED STATES.

The general deficiency bill, as reported by the House Committee on Appropriations, carried an appropriation to pay the judgment in favor of Barnes. The amendment was never considered by any committee of the House, but was offered as an amendment on the floor of the House on February 23, 1903, by Mr. Barney, of Wisconsin, a few minutes before the passage of the bill (Cong. Record, 57th Congress, 2d session, p. 2537), as follows:

Mr. BARNEY: I offer the amendment which I send to the desk.

The clerk read as follows:

"Insert in line 9, p. 83, after the word 'judgment,' the following: 'except the judgment in favor of Elias E. Barnes;' and in lines 11 and 12 strike out $45,964.06 and insert $22,269.59."

The amendment was agreed to.

Mr. BARNEY: I offer a further amendment, which I send to the desk.

The clerk read as follows:

Insert in page 83, after line 14, as follows: "And provided further, That no judgment heretofore or hereafter rendered under the act of June 16, 1880, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by, Congress, be, and the same is hereby repealed; and from all final judgments or decrees

heretofore rendered in suits of the character of those mentioned in said proviso an appeal shall be allowed to the Supreme Court of the United States at any time within ninety days after the passage of this act, except in cases where the amounts found due by said court have been paid at the Treasury."

* * * * * * *

Page 2537: Mr. BARNEY: * * * We were told by the attorneys that this was the only case that it will affect; that all others have been settled by the payment of the final judgment or in some other way.

* * * * * * *

Page 2538: Mr. BARNEY: This amendment was drawn by the attorney for the District of Columbia, and is in the exact language which was submitted by him, and he informed us that it applied only to the cases arising under the act of 1880.

Mr. COWHERD: I do not want to reserve the point of order if it does not affect those cases arising under the act of 1895.

The CHAIRMAN: The Chair understands the gentleman from Missouri withdraws the point of order.

Mr. COWHERD: Yes.

* * * * * * *

The question was taken and the amendment was agreed to.

* * * * * * *

The bill was then passed.

PROCEEDINGS IN THE SENATE.

Page 2544: House bill referred to Committee on Appropriations.

Page 2777: February 23, 1903, reported back with amendments.

Page 2880: March 2, 1903, passed the Senate with amendments.

Page 2943: March 2, 1903, House disagrees to Senate amendments *en bloc*, and asks for conference.

Page 3007: Conference report agreed to.

Page 3008: Bill passed March 3, 1903.

So, without any consideration, without Barnes ever having an opportunity to be heard, and after the Committee on Appropriations had unanimously reported an appropriation paying the judgment, on the say-so of the attorney for the District, Mr. Barnes' property was thus unceremoniously swept away from him, if this statute is to have a retrospective effect.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 143.

THE DISTRICT OF COLUMBIA

vs.

ELIAS E. BARNES.

This was a suit brought in the Court of Claims against the District of Columbia under the act of June 16, 1880, to recover for work done and materials furnished in the improvement of the streets in the District of Columbia under the late Board of Public Works and the Commissioners appointed under the act of June 20, 1874.

The suit was commenced August 4, 1880, and has been in almost continuous litigation ever since. The judgment appealed from is the *third* rendered by the Court of Claims, and the present appeal is the second prosecuted by the District of Columbia to this court.

The statement of the case by the appellant (R., pp. 1–16) embodies much irrelevant and immaterial matter and is, to say the least, obscure and confusing. The learned counsel, not content with the transcript which he himself caused to be prepared and which embraces even more than the rule of court permits, seeks to incorporate into it findings of fact made by the Court of Claims at a former trial upon a different record and upon other evidence, and asks this court

to disregard the findings upon which this appeal rests and adopt something else, not part of the record, in lieu thereof.

It is submitted that all this extraneous matter sought to be thus brought into the case should be excluded and disregarded by the court and the case tried upon the record before it according to its established rules.

Statement.

The appellant's statement is so disregardful of the findings of fact and is so erroneous that it is necessary to restate the case here.

The suit was to recover for work and labor done in the improvement of some eight streets located upon Capitol Hill, in the District, partly under contracts in writing and partly under orders and directions of the Commissioners. The findings show a very large amount of work performed, upwards of $300,000, comprising innumerable items, very many, if not a large majority, not specified in any written contract, but all of it accepted by the Commissioners for the use and benefit of the District of Columbia.

The present judgment awards to the appellee compensation for the *exact* amount of work done and materials furnished, as measured and certified by the engineer's officers of the District, at the *exact* price which the officers of the District and the appellee understood and agreed at the time should be paid.

Very few of the many items allowed are attacked. The items objected to are:

First. The price allowed for hauling away a portion of the material excavated in the grading of North Carolina avenue, D street S. E., and Third street S. E.

Second. The price allowed for the excavation of stiff clay on North Carolina avenue.

Third. The price allowed for excavation of "old gravel streets" on part of D street and Third street.

Fourth. The amount of excavation allowed for on North Carolina avenue.

FIRST.

The facts as shown by the findings are: That in April, 1872, the Board of Public Works awarded (as shown by an entry in their minutes) a contract to the appellee to grade North Carolina avenue and D street between Fourth street and New Jersey avenue at prices fixed by the board, and the contract clerk was directed to prepare a contract accordingly (R., p. 17).

At that time it required an excavation of 32,739 cubic yards on North Carolina avenue and 4,267 cubic yards on D street, a total of 37,006 cubic yards, to bring these two streets to the then established grade (R., p. 19).

On the same day a formal written contract was entered into, which provided that the work should be completed within ninety days from the first day of May, 1872, and that the price to be paid was thirty cents per cubic yard for each yard of "earth, sand or gravel" excavated, and one cent for each two hundred feet the excavated material should be hauled away. No price was fixed for the excavation of any other class of material found in the excavation (contract, finding 1, R., pp. 18–19).

The appellee proceeded with the work, and on the 2d of August, 1872, within the ninety days, completed the grading of both streets (finding 3, R., p. 19).

On May 21, 1873, a supplemental contract, called an extension of contract, was entered into at board rates, embracing, among other work, putting down the sidewalks and graveling the roadway of these two streets.

For more than two years the work remained in this condition, the grading completed and the sidewalks not laid.

On June 20, 1874, the Board of Public Works was abolished and Commissioners of the District appointed under that act. After the Commissioners assumed control in 1874, they decided, as they had a right to do, to change the grade of North Carolina avenue and establish a new grade. This change of grade involved cutting down North Carolina avenue some 64,573 cubic yards additional (finding 7, R., p. 21). And required the grades of the intersecting streets, D street and Third street, to be cut down to conform to the new grade. D street had to be excavated 20,752 additional yards, and Third street 22,248 additional yards (the original grade of Third street requiring a cut of 7,078 yards only—finding 13, R., p. 28). In short, the original amount of grading required on these three streets, under the terms of contract 264 and contract 413, amounted to 44,084 yards, all of which grading was done and completed under the Board of Public Works, and, for the grading so done, the appellee received exactly the contract price of one cent for every two hundred yards of haul. The amount of excavation added two years later by the establishment of a new grade was 107,573 additional yards, or a total of 151,657 yards.

Upon this state of facts the Commissioners in 1874 agreed with the appellee, who already had the contract to gravel and lay the sidewalks on all of these streets at their then existing grades, that he should do the additional excavation at the then current rates for work of that character, he to receive, in lieu of cash as provided under his original contract, certificates of indebtedness in payment for such work. The appellee agreed to it, proceeded with the work, was paid partial payments as the work progressed and completed it to the satisfaction of the District, and his work was accepted by the Commissioners and has been used for the benefit of the District ever since.

Before final settlement, however, the board of audit, which had the auditing of his accounts, was abolished by the act of March 14, 1876, and he remitted by the act of June 16,

1880, to the Court of Claims for a settlement, where his suit has been pending ever since.

The present judgment awards to the appellee the price that was current when the additional work was performed, and which is found by the court below to be fair and reasonable.

The appellant's assignment of errors disregards this entire state of facts, and, assuming that the appellee was under a binding contract to perform this additional work at the original price, contends that the Commissioners, without authority or consideration, increased the price, and that the court below held that the Commissioners were empowered to do so. The findings of the court contradict this assumption entirely. On the contrary, not only did the court hold the appellee down to the contract price wherever there was a written contract, but it went further, and, as to work done and settled for years before, set aside settlements and allowed the appellant to recover back $13,039.79 upon counter-claims for payments made to the appellee by the Board of Public Works in good faith because in excess of the prices stipulated in contract 413 (finding 17, R., pp. 30–31). The doctrine which the appellant contends for was enforced in its harshest and most rigid form against the appellee.

SECOND.

After the change of grading in 1874, which under the terms of the agreement with the Commissioners was to be paid for at the current prevailing rates, the appellee encountered a body of "stiff clay," of which he excavated upwards of 30,000 yards on North Carolina avenue, and the court has awarded him the usual and customary prices for this work, which the court finds to be a reasonable price (finding 8, R., p. 22).

As there was no contract existing in 1874 for the grading of North Carolina avenue, what has been said *supra* equally

applies to this item, but the complaint against it is still less substantial than to the price of the hauling, for in contract 264 there is no price fixed for any class of excavation except *earth, sand,* and *gravel,* and to be consistent the appellant must contend that the clay was to be excavated for nothing. There was no price fixed for clay excavation, and there is no reason to apply the price for either earth, sand, or gravel to it. Under that contract, it was a *casus omissus,* and the party would be entitled to recover a reasonable price for it. If the contract had been as in the case of Barnard, cited in the brief, that the party was to receive thirty cents per yard for each yard of *grading* done, that price might apply to any character of material excavated, but where the contract price applies only to a particular class of material and another class is encountered in an excavation, neither right nor reason would permit the application of such a price to the excavation of a material of a confessedly more expensive character.

THIRD.

The objection is apparently addressed to some portion of two small allowances on Third street and on D street, Third street aggregating $373.40 (item 9, R., p. 29) and D street aggregating $521.90 (item 2, R., p. 23).

The assignments of errors do not show what part or how much of these two items is objected to. The findings, however, show that on D street between *Second* and *Sixth* streets there were found 5,219 yards of "old gravel street" excavation, for which forty cents is allowed. How much of that excavation was done on that part of the street lying between Second and Fourth streets, which was embraced in contract 264, and how much of it was embraced on that portion of D street between Fourth and Sixth streets, which was embraced in the first extension of contract 264 of May 21, 1873, and which directly provides for this rate of forty cents, the find-

ing do not disclose. Whether any of it, or, if so, what portion of it, lay between Second and Fourth streets, the record is entirely silent.

As to Third street, the forty-cent grading is evidently embraced on that part of Third street between Virginia avenue and the Eastern branch under the extension of contract 413 of date of May 20, 1875 (R., p. 25), and which directly provides for board rates. It is not specially set forth in the findings on what section of the street it was, but inasmuch as the court has found that the section of the street embraced under the terms of the original contract 413 must be done at thirty cents and refused to reform that contract, and as there would be no "old gravel" street to be affected by the change of grade, all of that class of grading found on Third street between the limits of contract 413 must have been embraced in the 7,078 yards, the first grading done, for which thirty cents only was allowed; the forty-cent item must relate to the extension of contract

The objection to this item is a matter utterly indefinite.

It is submitted that the appellant must affirmatively show, *not* that he may possibly be injured, but that he has actually been injured and in some definite amount. This he utterly fails to do. It is with respect to this same item that contract 264 was reformed, this will be treated of later, in the brief.

FOURTH.

Objection is made as to the quantity of excavation allowed on North Carolina avenue. The court found as a matter of fact that the appellee performed the exact quantity of grading on North Carolina avenue, as shown by the measurements of the engineer under date of—

Aug. 9, 1872, 32,793 yards—Item 13, finding 9, R., p. 22;

M'ch 27, 1875, 20,438 yards—Item 15, finding 9, R., p. 22;

Dec. 2, 1875, 10,585.6 yards—Item 18, finding 9, R., p. 22;

Jan'y 22, 1876, 33,550 yards—Item 20, finding 9, R., p. 22;

aggregating 97,316.6 cubic yards of excavation.

As the original contract provided that the measurements should be made by the engineer of the District, it is difficult to comprehend what complaint the appellant can have in the premises. It is found as a fact by the court and is conclusive.

U. S. *vs.* Smith, 94 U. S., 218.

It seems, however, to be claimed that it is error because it is alleged that it is more in quantity than was claimed in one of the amendments to the original petition, and this seems to be the foundation of the assignment of error.

This is but another of the many errors of fact with which the appellant's brief bristles. The original petition, R., p. 1, claims a larger amount, although not in detail, but specifically refers to "measurements" on file with the District, and the last amendment of the petition, R., p. 12, claims exactly the amount allowed, so that the contention that it is not claimed in the petition is utterly without foundation. It is not shown nor pretended that it is more work than was actually performed. The objection seems to be founded on a refinement of pleading which does not nor never did obtain in the Court of Claims. This court and the Court of Claims in numerous cases have held that the strict rules of pleading do not obtain in that court. So that even if it were true that in the settlement of these numerous accounts a few yards more were allowed than was technically claimed, it would not avail the appellant.

In the case of The United States *vs.* Burns, 12 Wallace, 246, this court says: "The Court of Claims, in deciding upon the rights of claimants, is not bound by any special rules of pleading." The same thing is held in the case of Clark *vs.*

The United States, 95 U. S., 539, and again reiterated in the case of United States *vs.* Behan, 110 U. S., 338. This same doctrine has been elaborated in opinions in the Court of Claims. The purpose of that court is not to hold claimants down to any special and technical rules of pleading, but if upon the whole case there appears to be a just and equitable demand, the court will allow it, although it had not been technically and critically stated in the petition.

Burk *vs.* U. S., 13 C. Cl's, 231.
Mfg. Co. *vs.* U. S., 16 C. Cl's, 296.
Brown *vs.* D. C., 17 C. Cl's, 303.

The appellee submits that there is absolutely no merit in this assignment of error.

This covers the technical objections to the assignment of error, aside from the attack upon the court of its jurisdiction to reform the contract under the act of June 16, 1880.

Reformation of Contract.

As is said in a previous part of this brief, it is not definitely shown that any part of the judgment rendered in this case was rendered upon a reformation of contract 264. The most that can be said is that there may be a possibility that some portion of item 2, on D Street work, could have possibly been embraced within the scope of the reformation of the contract—a matter at best of some two or three hundred dollars.

It seems almost a misfortune that the act of June 16, 1880, under which the Court of Claims has taken jurisdiction (X) and adjudicated the entire series of cases brought under that act during the last twenty-five years, should, in the very last case pending, have the jurisdiction that it has exercised for a quarter of a century challenged. In a very elaborate way the learned counsel has undertaken to discuss the jurisdiction of the court under the various grants of jurisdiction to it for the past half century, and, by asserting that the District of Columbia and the United States are identical, seeks to

(X) O'Hare v. D. C. 18 C. Cl's. 646.
Cullinane v. D.C. 18 C. Cl's. 577.
Shipman v. D. C. 18 C. Cl's. 291,
affirmed in 119 U.S. 148.

draw, from the various acts conferring jurisdiction upon the Court of Claims with reference to suits against the United States, some reason by which he can break down the plain words of the statutes conferring jurisdiction to hear and determine claims against the District of Columbia. His argument is lengthy, but neither convincing nor sound.

It appears to the appellee that the entire answer to his contention is found in simply reading the plain words of the act of 1880, which confers upon the Court of Claims original, equitable, and legal jurisdiction with respect to claims against the District. In the case of Harvey *vs.* The United States, 105 U. S., 671, the mere grant of equitable jurisdiction by special act to the Court of Claims in that case was held by this court to amply warrant the court below to reform the contract and to enter judgment under the contract so reformed. That case would seem to be conclusive against the contention of the appellant.

In the very elaborate brief of the appellant the learned counsel seems to have overlooked the fact that this court in the case of U. S. *vs.* Jones, 131 U. S., 18, distinctly held that under the Tucker act the Court of Claims was clothed with equity jurisdiction where the equitable demand arose out of a money demand, and under that act the Court of Claims held that it had such jurisdiction (South Boston Iron Co. *vs.* U. S., 34 Court Cl., 175; Milliken *vs.* U. S., decided at the present term of the Court of Claims, but not yet reported).

From every point of view it clearly appears that this judgment simply gives to this appellee the reasonable amount for the work and labor that he performed in the improvement of the streets of the District. His work was honestly and faithfully performed, and in the very language of the court has been accepted and used for the benefit of the appellant, and no just reason exists why he should not recover a reasonable compensation for his labor and materials. The judgment should be affirmed.

JOHN C. FAY,
Attorney for Appellee.

Supreme Court of the United States.

No. 143.—October Term, 1904.

The District of Columbia, Appellant, vs. Elias E. Barnes. } Appeal from the Court of Claims.

[February 27, 1905.]

The action now appealed was brought under the act of June 16, 1880, known as the District of Columbia Claims' Act. (21 Statutes, 284.) The original petition was filed August 4, 1880. At subsequent stages of the case amended petitions were filed. On October 1, 1887, the Court of Claims decided the case in favor of the District of Columbia, giving judgment against the claimant for the sum of $11,074.11. (22 Court of Claims Reports, 366.) On November 18, 1887, the claimant filed a motion for a new trial, which was submitted on March 28, 1895, and allowed on April 1, 1895. The case was then referred, as provided in the act, and upon report and hearing judgment was rendered on November 11, 1895, against the District for the claimant in the sum of $31,754.57; being rendered for Barnes in the sum of $22,350.54, and for Ritchie, assignee, in the sum of $9,404.03, both sums due and payable as of January 1, 1876. On April 20, 1896, the defendant filed its motion for a new trial, which was granted on May 18, 1896. On March 31, 1902, the court rendered a judgment in favor of the claimant, and his assignee, in the sum of $23,694.47, due and payable as of March 1, 1876. (37 Court of Claims Reports, 342.) On April 22, 1902, an appeal was taken by the District from the judgment of March 31, 1902, to this court. This appeal was dismissed for want of jurisdiction. (*Barnes* v. *The District of Columbia*, 187 U. S. 638.)

Under the act of March 3, 1903, (32 Statutes, page 1070,) this appeal from the judgment of March 31, 1902, was taken by the District, bringing the case in review before this court.

Mr. Justice Day delivered the opinion of the Court.

We deem it unnecessary, in the view taken of this case, to set forth the voluminous findings of fact made upon the trial in the Court of Claims. So much of the findings will be commented on as is necessary to a determination of the legal questions involved, which are within a narrow compass. Nor do we find it necessary to consider the alleged discrepancies between

the judgment of the Court of Claims, when the judgment was in favor of the District, (22 Court of Claims, 366,) and the findings and conclusions when the judgment was rendered which is now appealed to this court. (37 Court of Claims, 342.)

This court does not sit to review findings of fact made in the Court of Claims. They are regarded as conclusive here, and our jurisdiction is limited to a determination of such questions of law as are properly brought to our attention upon the record. (*United States* v. *Smith*, 94 U. S. 214–218.)

The original action was brought in part on two contracts, which were in writing, duly executed by the claimant and in behalf of the District of Columbia, and known as Nos. 264 and 413, and were for certain street improvements in the city of Washington. These contracts were entered into on April 29 and July 23, 1872, respectively, under authority of the act of February 21, 1871. (16 Statutes, 427.) Certain verbal agreements are also set up as having been entered into between the claimant and the Commissioners of the District.

The Court of Claims, under the proofs, heard the parties upon the question as to the right to reform the two written contracts. It refused to reform contract No. 413, and decreed in favor of the District in the sum $13,039.79 for over payments made upon that contract. The court did reform contract No. 264, finding that, by mistake in the drafting of the contract, "the rate of 40 cents for grading old gravel streets to a depth of two feet" was omitted therefrom by mutual mistake of the parties, and that the written contract was executed without observing the omission. Upon the contract as reformed the claimant was permitted to recover for work done. Much of the discussion in the oral argument and the brief of the learned counsel for the Government is directed to the authority of the Court of Claims to reform a written contract in the exercise of the jurisdiction of a court of equity for that purpose, and much discussion was had as to the various acts conferring jurisdiction upon that court. But we think a construction of the act under cover of which this suit was prosecuted is all that is necessary to determine the question. The act of June 16, 1880, as appears by its title, was intended to confer on the Court of Claims jurisdiction to hear and determine all outstanding claims against the District of Columbia. For that purpose it was recited in the first section of the act that the jurisdiction of the court should extend to and it should have original legal and equitable jurisdiction of claims arising out of the contracts made by the Board of Public Works and extensions made thereof by the Commissioners of the District of Columbia, and also of the claims arising out of the contracts made by the Commissioners since the act of June 20, 1874, and broadly for all claims for work done by order or direction of the Commissioners, and accepted by them for the use, purposes

or benefit of the District of Columbia, and prior to the 14th day of March, 1876.

The language used is of the most comprehensive character, and confers, for the purposes stated, original legal and equitable jurisdiction.

It is true that the purpose of the various acts conferring jurisdiction upon the Court of Claims has been held to be to permit the adjudication of money demands against the United States, and it may be that under this act, as under others, there was no intention to confer equity jurisdiction beyond that which is required to enable a court to determine whether money relief should be granted. The intent of the act was to enable parties to submit the justice of their claims against the United States to adjudication in a competent court. For that purpose the act conferred in terms, equitable as well as legal jurisdiction.

The province of the Court of Claims is to pass upon the justice of the claim and adjudge accordingly. And it is obviously intended that, when necessary to adjudicate claims against the District, the court shall be unhampered in the exercise of jurisdiction, and as in many courts of this country having a civil code, there has been conferred upon the same tribunal the power to grant the necessary legal and equitable relief. One who has the right to money relief upon a contract mistakenly omitted to be reduced to writing, in accordance with the true agreement of the parties, has a claim of equitable cognizance, for the contract must be reformed to meet the intention of the parties, and when corrected may be adjudged a valid claim.

For the purpose of adjudicating such claims this statute gives to the court equitable jurisdiction in order that it may determine what the District ought to pay to the claimant. Although unable to grant a decree for specific performance or exercise the peculiar powers of a court of equity, the Court of Claims may determine the money relief to which the claimant is entitled, whether arising out of an equitable or legal demand. This principle was recognized in *United States* v. *Jones*, (131 U. S. 1–118) The Court of Claims in other cases has exercised the equitable jurisdiction conferred in the act of June 16, 1880, (*Cullinane* v. *District of Columbia*, 18 Court of Claims, 577, 594,) and like jurisdiction to reform contracts under the act of March 3, 1887, 24 Stat. 505, (*South Boston Iron Co.* v. *The United States*, 34 Court of Claims, 174.)

We think that the court had jurisdiction to reform the contract upon the facts found.

It is objected that the Court of Claims awarded relief for certain "stiff clay" excavated under claimant's contract. The findings show that this work was not specifically covered by the original agreement, and that the work was accepted by the Commissioners, and the District received the

benefit thereof; and the court finds that the excavation of the stiff clay was done under a verbal agreement with the Commissioners after the performance of the original contract, and that the claimant was entitled to the rate established therefor, as paid to other contractors for like work.

The act of June 16, 1880, permits a recovery for work done by order and direction of the Commissioners and accepted by them for the benefit of the District. While it has been held that this would not authorize a recovery for work done under the original contract, at higher prices than had been agreed upon, yet where there was a revival of the contract for distinct work there might be a recovery at higher rates, which entered into the terms of renewal as understood by the parties, notwithstanding the pre-existing contract. (*Campbell and Eslin* v. *The District of Columbia*, 18 Court of Claims, 193.)

The act of 1874 gave limited power to the Commissioners, and in the act of February 21, 1871, (18 Stat. 419,) providing for contracts of the Board of Public Works, it was distinctly provided that all contracts should be in writing and signed by the parties making the same. And it was held that this statute requires contracts to be actually signed and that mere entries on the journals of the board would not satisfy the statute. (*Barnard* v. *The District of Columbia*, 127 U. S. 409–411.)

But under the statute, June 16, 1880, now under consideration, the intention is manifest to permit the Court of Claims to adjudicate claims for all work done by the order and direction of the Commissioners, and accepted by them for the use, purpose and benefit of the District. For this purpose this is a remedial statute, and it is intended to permit parties to have an adjudication upon their demands where the District had been benefited by work actually done under the order and direction of the Commissioners and duly accepted. And the findings of fact show that the claimant was only permitted to recover for work so performed and accepted. As we have said, this right of recovery might not revive claims for work completed under former contracts, but here the finding is that the new agreement applied to a distinct subject matter and not to work covered by and performed under the original agreement. We find no error in the judgment of the Court of Claims in this regard. And so as to various sums awarded under findings of fact, establishing that more work was made necessary by reason of the change of grade on North Carolina avenue by the Commissioners in 1874, the change of grade making it necessary to further grade Third street, and to do work for that purpose. The findings show that this was done by the direction of the Commissioners and upon terms mutually agreed upon. Under Finding XIV, where the work is found not to have been done under the original contract, it is found that it was admitted by the defendant to be correct, and is work of which the District has received the full benefit. So as to other findings

to which exceptions are made, there is no dispute that the work was actually done to the satisfaction of the Commissioners upon terms agreed upon and the work duly accepted.

As we construe the statute, we think it affords ample authority to grant relief upon the facts found, which findings are conclusive upon us.

It is further urged by counsel for the Government that the pleadings are not sufficient to authorize the judgment, but we think that under the original petition and various amendments thereto the court was authorized to grant the relief adjudged.

The Court of Claims is not bound by special rules of pleading. The main purpose is to arrive at and adjudicate the justice of alleged claims against the United States. (*United States* v. *Burns*, 12 Wall. 246–254; *United States* v. *Behan*, 110 U. S. 338–347.)

On the whole record we find no error of law to the prejudice of the District.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.